Amnon Lehavi *Editor*

One Hundred Years of Zoning and the Future of Cities

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Introduction

The 1916 New York City zoning ordinance serves as an essential milestone in the development of zoning and other forms of contemporary land-use regulation. This book reconsiders the fundamental principles of zoning and city planning over the course of the past 100 years and the lessons that can be learned for the future of cities. Following an international conference hosted by the Gazit-Globe Real Estate Institute at the Interdisciplinary Center (IDC) Herzliya, Israel, on June 13–14, 2016, this book brings together the contributions of leading scholars—representing diverse methodologies and academic disciplines, including economics, planning, geography, sociology, law, and political science.

The book's ten chapters are divided into four parts, which address different aspects of zoning and planning, combining theoretical analysis with a close observation of case studies from across the globe. This interface between theory and practice seeks to identify whether land-use regulation may be based on universal know-how or if it is essentially a place-specific enterprise. The potential tension between academic/professional models and the need to solve real-life problems in varying contexts informs the debate about whether governments, planners, and developers are able to shift knowledge across borders, or is some of this wisdom simply lost in translation. The essence of zoning and planning policy thus highlights the prospects and limits of global markets and international organizations in improving the future of cities across the world.

Part I, titled "Revisiting the History of Zoning," offers a critical analysis of the conventional account of zoning as a top-down form of land-use regulation starting with the 1916 New York City code.

Sonia Hirt provides an historical account of various informal and formal modes of residential segregation dating back to the ancient world, the middle ages and early modern period, modern-day segregation in Europe and its colonies, and up to various forms of land-use regulation in the United States. The historical account of American zoning needs to be understood, argues Hirt, against (legally) failed attempts to introduce explicit forms of racial zoning from the second half of the nineteenth century following the abolition of slavery. The 1916 zoning ordinance created de facto segregation between different populations in view of its geographical

separation between permitted land uses across different parts of the city. However, the most effective instrument in creating residential segregation probably took place in another city in the same year—1916—when the city of Berkeley, California, created zones in which only one-family housing were allowed, thus separating them from multifamily buildings. Beyond exclusionary motives, the single-family home became a mainstay of early twentieth-century civic and social values, by which the single-family home was considered an essential building stone for good citizenship.

Raphaël Fischler offers yet another critical perspective on the history of zoning in North America, by comparing the 1916 New York City zoning ordinance with what had actually been the first zoning ordinance enacted in North America: the 1909 bylaws of the Village of Westmount in Quebec, Canada. The early example of Westmount demonstrates how zoning has practically preempted city planning, despite the conventional wisdom by which specific zoning schemes should ideally follow comprehensive city planning. In Westmount, zoning principles were generated largely by private developers, who sought to certify that the bylaws would ensure high-quality construction and the preservation of green spaces to protect real estate prices, at a time when Westmount became a wealthy suburb of Montreal. The same zoning principles were also true for New York City and other American cities, which enacted zoning ordinances in the first part of the twentieth century. Fischler argues that the contemporary role of planners and regulators should be one of advancing broad-based progressive goals, beyond merely engaging in deal-making with real estate entrepreneurs, in order to meet the future needs of cities.

Amnon Lehavi identifies the "missing link" in the traditional account of the evolution of zoning, and the 1916 New York City ordinance in particular. While the legal analysis of zoning usually focuses on the need to control "environmental externalities" (e.g., conflicts among adjacent landowners resulting from nonconforming uses) or "fiscal externalities" (by which private developers are held accountable for increased public expenditures resulting from new projects), zoning was also motivated from its early days by attempts to control "market externalities." This means that both regulators and private stakeholders were concerned with the market effects of new developments on existing commercial activities, housing prices, and other market features. Despite the practical dominance of market-driven motives for zoning, so far American courts have not comprehensively articulated the legal legitimacy of employing the zoning power to address market effects. The chapter sets out to close this substantial gap in zoning theory and policy.

Part II, titled "The Changing Landscape of Zoning," researches how contemporary concepts of zoning and innovative mechanisms for land-use controls impact the built environment in cities.

Kevin Leiden and Lorraine Fitzsimons D'Arcy make the case for mixed-use zoning as a key regulatory principle to create contemporary cities more livable and sustainable, and the residents who live in them more contented. Leiden and Fitzsimons D'Arcy criticize the traditional divisions of cities and suburbs into residential zones that are separated from commercial hubs and the growing dependence on cars to move across cities dominated by roads and highways. They call to rely on

village-scale planning in designing urban neighborhoods, where homes, working places, shops, and open spaces coexist, and to re-purpose zoning laws to enable the building of communities that people prefer to live in.

Gerald Korngold introduces the increasing role of "Community Benefits Agreements" (CBAs) as a dialogue-based mechanism that accompanies current zoning and planning processes. Studying agreements between developers and community groups in New York City and elsewhere in the United States, Korngold shows how developers seek community support via CBAs to prevent opposition to rezoning schemes and to get buy-in for desired public subsidies, whereas local groups seek to enhance their representation in the decision-making process. Korngold suggests that CBAs bring inclusiveness and transparency to the land regulation process, even though there may be loss in public planning on a municipal-wide basis.

Part III, "Economics of Zoning: A Case-Study Analysis," revisits the economic foundations of zoning and urban policy in the context of current domestic markets, while also looking at the regulatory and market effects of international agreements on domestic regulation of land uses.

Gabriel Ahlfeldt, Wolfgang Maennig, and Felix Richter offer a place-based policy evaluation of urban renewal programs in reunified Berlin. Studying 22 urban renewal areas in Berlin between 1990 and 2012, the authors estimate the effects of the renewal policy and zoning measures on property prices for each redevelopment area, by comparing price developments in these areas to a series of runner-up areas and to geographically close transactions. The authors find a considerable amount of heterogeneity in results. While some areas profit from renewal policies—especially in the most central areas in the former eastern part of Berlin—other urban renewal areas may even experience a decrease in property prices. This means that urban renewal policies and zoning measures that implement them are not a panacea for urban success.

Daniel Shoag and Lauren Russell identify a surprising impact of land-use regulation on fertility rates. While the general supply of housing units and other types of land uses clearly influence where people choose to live, the authors find a much more dramatic influence of the stringency of land-use controls, and zoning in particular, on the decision of households regarding how many children to have. Exploiting data from the American Institute of Planners, the Wharton Urban Decentralization Project survey, and the Wharton Residential Land Use Regulation Index (WRLURI), in conjunction with fertility data from the CDC and the Survey of Epidemiology and End Results data, the authors find a significant negative relationship between land-use restrictions and fertility rates across all measures and geographies in the United States.

Moving to the potential impact of international investment and trade agreements on domestic land-use regulation, Fabian Thiel studies the recent steps toward the completion of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, and the current "blind spot" about CETA's potential influence on land law and policy. Analyzing the tenets of land policy in Germany, including the legal concept of property and principles of zoning, Thiel argues that

the potential preemption of supranational norms is likely to undermine not only democratic legitimacy but also the functionality of land-use regulation.

Part IV, "Social and Political Dimensions of Zoning," analyzes the dominant yet-often-implicit social and political motives that are driving zoning and planning decision-making.

Eran Razin highlights a model of political checks and balances in planning decentralization, examining the case study of Ontario, Canada. Razin shows how the decentralization of zoning and other land-use decisions from regional to local governments has not resulted in the lack of effective oversight or in an unequivocal move of zoning policy to a model of "soft planning." Ontario's system of checks and balances includes a provincial appeal board that has appellate jurisdiction over nearly all planning and zoning decisions made by local governments, binding provincial planning documents, and mandatory official municipal plans. The local government's zoning and planning agencies are typified by professionalism and lack of endemic corruption. This new political system thus allows for zoning decentralization with relatively clear rules.

Closing the book, Ronit Levine-Schnur offers an ethical-normative vision for revitalizing land-use and zoning law, as we mark the centennial of the 1916 New York City zoning ordinance. She argues that it is crucial to regenerate the land-use law system and to ground it on an ethical foundation, which is currently missing. Levine-Schnur suggests that the system should be based on an ethical commitment to fairness and sustainability. It should be guided by principles of democracy and transparency; norms of accessibility, diversity, and density; and a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. The chapter focuses on the latter principle, demonstrated by two examples: identifying the normative basis of development agreements and analyzing the distributional effects of eminent domain.

It is my hope that the book will serve academics, practitioners, decision-makers, and students in reassessing the history of zoning and other land-use regulations, their current performance across various countries, and the ways they can be utilized to meet the future needs of cities.

Finally, I would like to thank Dr. Efrat Tolkowsky, CEO of the Gazit-Globe Real Estate Institute, and Michal Amir, the Institute's Content Manager, for their support in putting this book together. I am particularly indebted to Daniel Klein for his superb editorial assistance.

Amnon Lehavi

Part I
Revisiting the History of Zoning

Split Apart: How Regulations Designated Populations to Different Parts of the City

Sonia A. Hirt

Abstract This chapter reviews how urban regulations in history have been used to relegate populations to different parts of the city and its environs. Its main purpose is to place the twentieth-century U.S. zoning experience in historic and international context. To this end, based mostly on secondary sources, the chapter first surveys a selection of major civilizations in history and the regulations they invented in order to keep populations apart. Then, based on primary sources, it discusses the emergence of three methods of residential segregation through zoning which took root in early twentieth-century United States. The three methods are: segregating people by race, segregating them by different land-area standards, and segregating them based on both land-area standards and a taxonomy of single- versus multi-family housing.

1 Introduction

In the United States, zoning—the widely used municipal instrument that separates the land into sections, or zones, with different rules governing activities on that land (Levy, 2009; Pendall, Puentes, & Martin, 2006)—has exercised enormous power in shaping the built environment for about a hundred years (Fischel, 2000; Kayden, 2004; Whittemore, 2013). One standard feature in North American (U.S. but also Canadian) zoning ordinances has been the dichotomy of detached single-family homes and multi-family housing. The single-family category is omnipresent in American zoning ordinances to the point that it is hard to find an ordinance that does not use it. As Hirt (2013a) argues, this is true not only for the thousands of traditional ordinances around the country but also for the fashionable form-based codes (for example, Denver's and Miami's). Clearly, the zoning taxonomy exists so that

I thank my graduate assistant Hossein Lavasani for his help with this chapter. Parts of the above text appear in another of my articles: Hirt, S. (2015). The Rules of Residential Segregation: US Housing Taxonomies and Their Precedents. *Planning Perspectives*, *30*(3), 167–195.

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that different types of housing are placed in separate parts of town: the housing types (and therefore the people living in them) are expected to reside in different areas. In other words, the taxonomy is an instrument for segregation by type of residence. And since zoning's housing taxonomy often intersects with race and class divisions, it can serve as a mechanism of race and class exclusion: hence, the long-standing critique of the traditional U.S. zoning model as exclusionary.[1]

The traditional zoning categories, including those of the single- and multi-family residential districts, are so commonplace in the United States that justification is rarely demanded (Levine, 2010), and the categories have attained a status of normalcy and inevitability (Wickersham, 2000). Yet, all categories come from somewhere; they may take root in certain contexts yet be absent in others. In today's European countries, for example, exclusive single-family districts are rarely defined and the legal border between single-family and multi-family housing is not nearly as firm as it is in the United States (Hirt, 2007, 2012).

This chapter traces how today's routine taxonomies of single- versus multi-family housing developed. My focus is on the U.S. experience in the early twentieth-century, when this system of classification gained acceptance. However, I am also interested whether this (or another) taxonomy as a tool of housing segregation is a common historic occurrence. Did other societies in world history embed a similar housing typology in their urban rules? What were these rules and were they used for exclusionary purposes too? Is the U.S. case distinct at all? Placing the U.S. experience in a broad historic and international context helps appreciate the fact that no rules and regulations are "normal" or inevitable; on the contrary, they are always the product of specific times and places.

The chapter is divided into two major parts. First, I survey a selection of major civilizations in history and the rules they passed to foster residential segregation in cities and their environs. Because of the breadth of this survey, it is admittedly fragmented. It is also based mostly on secondary sources. Next, based mostly on primary sources, I discuss the development of U.S. zoning regulations that sought residential segregation in the early 1900s. I present three major ideas from U.S. cities during this time period: to segregate people and their housing by race, to segregate them by different land-area standards, and to segregate them based both on land-area standards and a housing typology of single- versus multi-family homes. Finally, I suggest some reasons for the popularity of restrictive single-family zoning in the U.S. planning tradition.

[1] The literature on US exclusionary zoning is well-known and I will not repeat its basic charges here. The classics include P. Davidoff and M. Brooks. "Zoning out the poor", in *Suburbia: American dream and dilemma,* edited by P. Dolce. Garden City: Anchor, 1976; A. Downs, *Opening up the suburbs: An urban strategy for America*. New Haven: Yale University Press, 1973; C. Haar and J. Kayden (eds). *Zoning and the American Dream: Promises still to keep.* Chicago: Planners Press, 1989.

2 Precedents

In all likelihood, urban residential segregation has been a constant feature of human settlements throughout world history, and it is only its extent and type that vary (Lofland, 1985; Low, 2004; Marcuse & Van Kempen, 2002). For example, the common axes of division in ancient and medieval cities were caste, ethnicity, religion and occupation (Sjoberg, 1960; Vance, 1990). Separation based on these criteria could have been driven by authoritative action, social customs, or the economic advantages emanating from the co-location of work activities (e.g., because different groups specialized in different types of production). In contemporary contexts, including U.S. metropolises of today, some traditional divisions such as those by occupation have faded due to the separation of home and work (i.e., the economic advantages following from the co-location of similar work activities in residential quarters have been lost). Yet other spatial divisions—by income and race—persist (Fry & Taylor, 2012), even if some contemporary public policies, such as inclusionary zoning, may be trying to soften them.[2]

Discussing the evolution and causes of residential segregation over time is, undoubtedly, an endeavor of encyclopedic proportions, perhaps best achieved by C. Nightingale in his excellent recent monograph (Nightingale, 2012). Below, I take on a simpler and more modest task. I offer a brief historic survey not of *de facto* residential segregation but of segregation as a matter of zoning-like law imposed by some type of city authority.[3]

2.1 The Ancient World

Evidence that residential segregation was deliberately pursued in the major ancient civilizations is mixed. We find several civilizations in which rules of segregation existed. But we also find that the rules were weak (or weakly enforced), because most parts of cities ended up quite mixed.

According to Nightingale (2012), the ancient Mesopotamian city of Eridu was the birthplace of legally mandated residential segregation: Babylonian poets writing circa 600 BCE believed that the God Marduk ordered that his temple be surrounded by the homes of king-gods, whereas the ordinary mortals were sent to reside

[2] Inclusionary zoning and zoning for affordable housing is also widely discussed in the literature and I will not repeat the basics here. For example, D. Porter *Inclusionary Zoning for Affordable Housing*. Washington, DC: Urban Land Institute, 2004; M. Morris, *Incentive Zoning: Meeting Urban Design and Affordable Housing Objectives.* Chicago: Planners Press, 2000.

[3] We should keep in mind that zoning rules are only part of a package of actions through which governments may pursue residential segregation. The reshuffling of the Parisian population during the Haussmann rebuilding frenzy in the 1800s and the consolidation of public housing in U.S. central cities in the 1900s have caused residential segregation more than zoning rules could.

separately in the outer town.[4] This type of socio-spatial division was the original method of housing segregation forced upon cities and their environs: elites (royals, priests and their immediate circles) in planned walled enclaves; everyone else outside (Van Kempen & Şule Özüekren, 1998). This tradition was carried on in the other major cities in the region; for example, Ur, which peaked at about 2000 BCE; and Babylon, which was founded at about that time. Shang-dynasty China (second millennium BCE) had similar rules, as explained in later ritual texts such as the *Chou Li* (second century BCE). In this Chinese tradition, only the royals and their entourage had the right to live in "forbidden" walled inner cities. But, whereas the inner cities were planned and homogeneous, the outer cities, which were home to the large majority of the population, showed a less orderly pattern of social differentiation (Benevolo, 1980; Knox & McCarthy, 2005; Smith, 2010). If there were rules on the outer cities, they must not have been rigidly enforced. Still, the formal division of elite insiders and lower-class outsiders had vast consequences for cities and their laws through history.[5] U.S. zoning advocates of the early 1900s explicitly recognized it as a predecessor of modern zoning (Bassett, 1922a).

In some of the famous planned Egyptian cities such as Tel-el-Amarna, which was built about 1300 BCE, there were rules for a more intricate type of housing division. This time, separate areas were purposefully reserved for people of specific occupations: for example, building workers east of the city center. However, most of the urban fabric was not clearly differentiated by status or profession. According to H. Fairman: "What appears to have happened is that the wealthiest people selected their own house sites, and built along the main streets, to whose line they generally adhered. Less wealthy people then built in vacant spaces behind the houses of the rich and finally the houses of the poor were squeezed in, with little attempt at order, wherever space could be found. The houses of all types were found in a single quarter, and though there were slum areas it is evident that there was no zoning" (Fairman, 1949). A stricter and more sophisticated spatial partition by occupation, which coincided with caste, spread in the cities of ancient Indus from roughly the time of Tel-el-Amarna. This is according to the Vedic treatises written between 1500 and 1000 BCE (Heitzman, 2008). Among a myriad of other issues, the Vedic treatises outlined detailed building rules specific to caste and occupation. For example, "the houses of the Brahmans [the priests/scholars]… must occupy four sides of the quadrangle which is an open space in the center" and "the houses of the Kshatriyas [the soldier class] must occupy the three sides of the rectangular plot" (LeGates, 2004). The castes were expected to occupy different quarters of planned cities—a tendency that appears to have only strengthened with time, as the caste system of the Indian civilization became more sophisticated. Plans for towns from the eight century BCE, for instance, show delineated districts for different people: Brahmins and priests in the center, surrounded by Sudras (artisans), Vaisayas (mid-caste farmers

[4] Since Marduk was not real, the order was likely passed by the priests who ruled in his name.

[5] With the growth of suburbs in American history, the roles of urban center and periphery were reversed. Rather than the city centers, it was the suburbs that became "walled off" (via zoning, that is).

and tradesmen) and guards. Each of the lower castes and professions (e.g., shoemakers, potters, milkmen, basket-weavers, blacksmiths, fishermen and hunters) was assigned a district in the next ring of the town plan (Ben-Joseph & Kiefer, 2005). According to Heitzman (2008), the *Arthasastra*, written some five hundred years later, prescribed a highly stratified society formally organized by caste and occupation (e.g., from craftsmen to entertainers, from food producers to jewelers). The caste system translated into zoning-like divisions. As Dutt (1925) explains, once the principal streets were laid out, planned cities were divided into wards: "Distribution of professions and castes as well as allotment of sites were made entirely with reference to pada-vinyāsa, a pada or block being set for a caste or a profession".

That some (but few) of the Greeks attempted zoning we know from Aristotle regarding Piraeus.[6] The city is famous for its grid plan designed by Hippodamus of Miletus about 450 BCE. What is less known is that Hippodamus proposed a proto-zoning division for Piraeus. Based on this, Aristotle erroneously credited Hippodamus with being the inventor of "the art of planning cities" and "the divisioning of cities".[7] Specifically, Hippodamus proposed a caste-based, tri-part division consisting of sacred, public and private urban areas, each corresponding to one of the three classes he believed existed in Greek society. In Aristotle's words, Hippodamus "cut up Piraeus"; he "planned a state, consisting of ten thousand persons, divided into three parts, one consisting of artisans, another of husbandmen, and the third of soldiers; he also divided the lands into three parts, and allotted one to sacred purposes, another to the public, and the third to individuals. The first of these was to supply what was necessary for the established worship of the gods; the second was to be allotted to the support of the soldiery; and the third was to be the property of the husbandman". The division was meant to be not merely symbolic but also physical: the inscriptions on boundary stones from the fifth century BCE show that the various districts were meant to serve the three different purposes as Hippodamus envisioned them. However, we do not know whether the authorities enforced them over time (Gates, 2010). Further, no clear evidence exists that physical divisions were legally mandated and enforced in cities which were not highly planned (like Piraeus) from the start—that is, in most cities.

The Roman case seems to have been similar to the Greek. Despite the presence of highly sophisticated planning and building laws, residential stratification in space was clearly exhibited in few cases; in the Roman case, typically in new towns settled by military conquest, where the different quarters were designated based on status (Hugo-Brunt, 1972). Surely, as in all societies where inequality and labor specialization existed, there were groupings of different types of people in different places: artisans tended to congregate in some locations of Rome; merchants in others (Van Ham, Manley, Bailey, Simpson, & Maclennan, 2012); and the wealthy had

[6] Aristotle, *Politics*, *Book II* (Chapter VII) (circa 350 BCE) (translated by W. Ellis) Accessed on July 18, 2012 at http://www.gutenberg.org/files/6762/6762-h/6762-h.htm#2HCH0020

[7] I say "erroneously" because today we know these planning principles were already in use in earlier civilizations. S. Marshall, (ed.) *Cities, Design and Evolution*. London: Routledge, 24, 2009.

made a haven of luxury villas in the scenic eastern hills of the great city (Bruegmann, 2006).

The Roman census used one particular division that coincides with some of today's zoning taxonomies. It recognized two housing categories: the *domus* (the high-class detached homes) and the *insulae* (the cramped multi-story buildings, where the large majority of the urban population lived).[8] But it is not clear whether the spatial separation of *domus* and *insulae* was legally pursued. Despite Rome's notoriously brutal treatment of slaves and other oppressed people, the city itself was only mildly segregated; its classes mingled freely (Arnott & McMillen, 2008; Lofland, 1985). According to Morris (1979): "With the exception of the emperors' palaces on the Palatine Hill and possibly separate working-class districts on the downstream banks of the Tiber and the slopes of the Aventine, high and low, patricians and plebeians, everywhere rubbed shoulders without coming into conflict. On the subject of workers' housing Carcopino states that "they did not live congregated in dense, compact, exclusive masses; their living quarters were scattered almost in every corner of the city but nowhere did they form a town within the town" (Morris, 1979). Similarly, according to Reynolds: "First of all is the close juxtaposition of the wealthy and the single-room high-rise apartment dwellings of the poor. As this and many other plan fragments show [referring to Emperor Severus's map of Rome from 200 AD], there was no significant economic segregation in Rome" (Reynolds, 1997).

2.2 *From the Medievals to the Early Moderns*

One of the clear predecessors of modern-day partitions through zoning was conceived by the European and Middle Eastern cultures during the medieval age. This method was the *fondaco* (in Italian; *foundax* for the Byzantines and *funduq* for Arabs) and was used for foreign groups residing in a city.[9] Although this institution has ancient origins,[10] it flourished in the early-to-mid part of the second millennium, after cities had recovered from post-Roman decline and multi-national trade had intensified. Fondaco-like arrangements were especially popular in port cities along the Mediterranean, the Black Sea and the Baltic coasts, and in other nodes of energetic foreign trade (Keene, Nagy, & Szende, 2009). Initially, *fondaco* referred to a large single structure comprising housing, shops, baths, and storage facilities occupied by foreign merchants who resided in a city on a permanent or temporary basis. Eventually, however, it came to denote an entire town quarter designated to a par-

[8] O. Robison, *Ancient Rome*, 15. The census at the end of the third century recorded 1790 *domus* and 44,300 *insulae* in Rome, according to L. Benevolo, *The History of the City*, 176.

[9] This type of arrangement was also used by some Chinese and Japanese rulers. D. Keene, Cities and Empires. *Journal of Urban History* 32(1) (2005) 8–21.

[10] Some ancient cities, going back all the way to Harappa, had areas outside of town designated for the foreign travelling merchants. See C. Nightingale, *Segregation*.

ticular group, a quarter that was often walled off and locked at night. In Byzantium's capital Constantinople, likely the most advanced city of the early second millennium, groups of foreigners were in the dozens, most of them comprising large numbers of merchants specializing in different types of goods.[11] And whereas Constantinople's indigenous rich and poor tended to live side by side, the foreigners did not and their co-existence with the locals was not always easy. At least as far back as the early 1000s, the Byzantine Emperor began assigning city quarters to different foreign groups; for example, the Venetians got their quarter in 1082 (Dursteler, 2006). In city-states too, the establishment of a *fondaco* required a government decree. Venice granted *fondachi* to a whole string of communities: Germans, Dutch, Persians, Arabs, Greeks, Armenians, etc. (Constable, 2004; Kostylo, 2012). Some national groups craved them because the *fondachi* offered a degree of autonomy and the possibility of having one's own cultural and religious community. The Jewish people, for example, who were routinely prosecuted elsewhere throughout Europe, perceived the *fondaco* granted to them by Venice as desirable.[12] It carried the name *getto*—reportedly the first use of this term, but without today's negative connotations. As evidence of the appeal of the Venetian *fondachi*, in 1526, residents of Venice who were subjects to the Ottoman Sultan petitioned the city authorities for a place of their own, just "as the Jews have their ghetto" (Kostylo, 2012). But whereas the ethnic enclaves offered security from hostile local commoners, they could not protect their residents when the very authorities who granted them embarked on the war path. At one point, Byzantine authorities locked Arab, Jewish, Venetian, Genoese and Pisan merchants in their walled enclaves and massacred them wholesale (Nightingale, 2012).

Several other important predecessors of modern zoning spread during the late medieval and Renaissance age in England. During the intense urban growth of the Elizabethan age, the Queen passed a series of decrees that sharply divided urban insiders and outsiders. Specifically, she forbade building within three miles of the gates of the cities of London and Westminster.[13] In addition, she banned the fur-

[11] Medieval cities, like ancient ones, exhibited clear signs of occupational specialization in space. Medieval streets often carried the names of the occupational groups that dominated them: the street of goldsmiths, the street of glassworks (see Sjoberg, G, *The Pre-industrial City*). But unless occupation intersected with nationality or ethnicity (as in the case of foreign merchants), this separation followed from social customs and the advantages linked to the proximity of similar economic activities, rather than from law. The only relatively modern example of a government attempt to legally segregate a city by profession (and caste) that I could find comes from St. Petersburg, Russia. In 1703, Peter the Great tried to segregate the city. The population was divided into three groups: the merchants and professional specialists, the shopkeepers and craftsmen, and the commoners, each with their own quarters. But according to M. Hugo-Brunt, *The History of City Planning*, the authorities failed to maintain the separation.

[12] Many medieval European cities had their Jewish populations confined to a quarter that "resembled a colony on an island or on a distant coast"; Lofland, *A World of Strangers*, 1973, 50. Other populations often confined to separate quarters were the sick and the "feeble-minded."

[13] This was a very mild treatment as compared to what the English were doing in Ireland. In the 1400s, the Crown decreed that farmers plow seventy miles of earthworks to keep the "wild Irish" away from English-speaking Dublin. Later monarchs even forbade Irish Catholics from living in any cities located on the island where they were born. See C. Nightingale, *Segregation*.

ther subdivision and subletting of houses within the cities, and set stricter requirements for building materials (Green, 2011). Because the lowest classes of English society were precisely the ones to settle in self-built structures in the immediate vicinity of cities or in cramped and poorly constructed shared dwellings within cities, Elizabeth's decrees had the effect of restricting the inflow of undesirable populations to England's premier urban nodes. English nuisance laws—another antecedent of zoning—predated the Elizabethan age. They were first used in England in the twelfth century (Fifoot, 1949). But whereas the concept was originally employed only against encroachments upon royal lands and public roadways, as urban growth intensified, the doctrine was expanded greatly to acquire modern-day exclusionary undertones; for example, offenders were accused of having subdivided their houses to the point where they had become "overpestered" with the poor (Abrams & Washington, 1989). As growth continued, London's developed increasingly more sophisticated regulations. The famous Rebuilding Act of London of 1667 that followed the Great Fire established a formal distinction between the houses of the high-class Londoners and those of the rest: "There shall be only four sorts of buildings: the first and least sort fronting by-lanes, the second sort fronting streets and lanes of note, the third sort fronting high and principal streets… The fourth and largest sort of mansion houses for citizens or other persons of extraordinary quality not fronting the three former ways".[14] But there is no evidence that the goal was to separate the rich from the poor spatially. In his acclaimed plan for the reconstruction of London, Christopher Wren proposed to ban suburbs (which at the time were all slums), but the Crown rejected his idea. Thus, London—very much a city of mixed wealth and poverty—was rebuilt mostly on the intact foundations of the burnt-down buildings. Urban social mixture was thus not rooted out (Adams, 1935).

This is not to say that residential segregation by wealth and power was absent. The status of West-End Londoners was clearly higher than that of East-End Londoners. But when the West End began to grow after the Great Fire, it was not even subject to public rules (i.e., the Rebuilding Act) because it was outside of the city limits. Attempts to launch parliament legislation to designate the West End for the rich failed (Nightingale, 2012), and the area developed following private contracts between landowners, builders, and occupants (Platt, 2004). As Green (2011) rightfully argues, much like players of the same sort today, London's seventeenth- and eighteenth-century large landowners had a "vested interest in minimizing uncertainty". The contracts they created covered many issues, from site layout to aesthetics, which are reminiscent of today's zoning. They also sought to ensure that the class composition of the new residents remained stable. According to Rasmussen (1937): "When an earl or a duke did turn his property to account, he wanted to determine what neighbors he got. The great landlord and the speculative builder

[14] *An Act for Erecting a Judicature for Determination of Differences Touching Houses Burned or Demolished in the Late Fire Which Happened in London* (1667). Accessed on November 2, 2012 at http://www.museumoflondon.org.uk/Exploreonline/Past/LondonsBurning/Themes/1405/1408/Page1.htm

found each other, and together they created the London square with its character of unity, surrounded as it is by dignified houses all alike". These class-based private regulations flourished through the next century and became a dominant means for protecting upper-class housing enclaves from various undesirable others both in England (McKenzie, 1994) and, as I further discuss, in the United States.

But restrictive deeds covered just fragments of the metropolis. Throughout London, wealth (or poverty) did not guarantee spatial seclusion. Mixing the homes of the rich, who generally lived along the main streets, and those of the poor, who generally lived along the back alleys remained the norm all the way to the industrial era. Robert Fishman (1987) cites how one observer saw social mixture in London in 1748: "Here lives a personage of high distinction; next door a butcher with his stinking shambles! A Tallow-chandler shall be seen from my Lord's nice Venetian window; and two or three brawny naked Curriers in their Pits shall face a fine Lady in her back Closet, and disturb her spiritual Thoughts".

2.3 Modern-Day Segregation in Europe and its Colonies

A new way of thinking about human diversity and, therefore, about residential segregation in cities came into being in the late 1700s, when the West Europeans began to perceive themselves as a single race that was qualitatively different from the races of the people they were colonizing. Certainly, as the long list of pro-segregationist rules shows, many other explicit and implicit definitions of human difference and incompatibility had developed throughout history. Not until the late 1700s, however, did race enter the conversation as a generalizing category denoting commonality and otherness among peoples (Hannaford, 1996). From then on, as vast as the perceived differences (and therefore animosities) may have been between, say, British Protestants and Irish Catholics, they paled in comparison with the perceived contrasts between people of European and non-European descent.

The expanding European empires developed a wide range of laws and building practices meant to separate "black town" from "white town" in their colonies. As Nightingale (2012) reports, these date back to the Dutch construction of divided cities in the island of Java and the British construction of divided cities in India and other parts of Asia (e.g., Kolkata, Madras, Bombay, Shanghai and Hong Kong). The French and Belgians employed similar methods in their African colonies; the Spanish and the Portuguese in Central and South America. Co-existence was perceived as a threat to public security, health, sanitation, and morals; in contrast, segregation was characterized as natural and beneficial to all parties involved. For instance, when in 1819 the modern-day city of Singapore was established on the grounds of an ancient settlement, its British lieutenant-governor S. Raffles used the mouth of the Singapore River as a racial border. Nightingale (2012) claims that one of his first acts was to designate prime lands on the northeast side of the river "exclusively for the accommodation of European… settlers." Chinese, Indian and Muslim

groups were given their own zones, ostensibly because such an arrangement would maximize the "comfort and security of the different classes of inhabitants."

Laws as brutally divisive were not the norm in cities within Europe at the time. But, as the Industrial Revolution transformed European cities into places of nightmarish overcrowding and pollution, many other types of laws (sanitation, health and building) become the standard fare (Hall, 2003; Talen, 2012). By the late 1800s, Germany established itself as the world leader in "scientific" urban administration. The "example of Germany," to borrow the title of a book written by an early twentieth century British reformer (Horsfall, 1904), was heavily studied and eventually emulated through Europe and North America (Akimoto, 2009; Cherry, 1996; Mullin, 1976).

America's foremost legal experts at the time, such as Frank Backus Williams,[15] attributed the birth of modern-day zoning to the Germans (Williams, 1914; Williams, 1922). The particular inventor was Professor Reinhard Baumeister of Karlsruhe, who in a 500-pages-long tractate from 1876 observed that certain land uses (e.g., manufacturing, warehousing, retail, etc.) tended to congregate in industrial-age cities more than at other points of history. His proposal was to craft a municipal instrument that would legally cement the economics-based congregations and mandate a greater separation between industry and dwelling quarters, since industry posed greater hazards to human health than ever before. This type of zoning proposal was different from the many sporadic attempts made throughout history to partially divide cities in sectors with different populations, as discussed in the earlier sections of this chapter. German municipal zoning was systematic and citywide, was based on the idea that the urban fabric can be scientifically evaluated and arranged to make cities healthier and more efficient, and included very detailed regulations on building density and shape as well as land use—precisely the type of regulations we find in today's zoning codes. Baumeister did not envision municipal laws that would segregate the population of German cities by class, ethnicity or some other traditional axis of division (which of course is not to say that such separations did not exist in real life). In fact, he was rather vague on the subject and claimed that municipal administrators should promote segregation in some parts of town and integration in others (Baumeister, 1876). But when his idea first became reality, in Frankfurt of 1891, a division of the population based on status became embedded into the city's pioneering comprehensive zoning act through the establishment of residential districts with different land-use and building rules (Mullin, 1976). Frankfurt had two types of residential zones. The country-dwellings district was clearly intended to house the well-to-do. It was situated in the panoramic parts of the city, away from polluting manufacturing. It required that a large part of each residential lot be kept open, thus promoting the development of detached homes at low densities. The second, less desirable residential zone was intended for the small homes of the working class. But the division was not absolute: the ordinance relied on its area and bulk rules to distinguish between the two housing types without setting a firm legal border between them. It was legally possible to build small individual homes or

[15] On his life and work, see G. Power, The advent of zoning. *Planning Perspectives* 4 (1989): 1–13.

multi-family dwellings in either residential zone. Within a few short years, most large German cities had followed the example of Frankfurt. Some, like Munich and Essen, made a distinction between districts for detached and bloc (attached) structures (Williams, 1913). Still, the boundaries between them remained vague (Liebmann, 2002; Light, 1999; Logan, 1976). The authorities reserved the right to permit housing blocs in the areas designated for detached homes. According to Williams (1913), in Essen, for instance, even in the areas zoned for detached buildings "practically everybody applies for permission to build double houses or groups". It was later in the United States, as I argue next, that the dichotomy between single- and multi-family housing became established.

3 Residential Taxonomies as Means of Segregation in American Zoning

As the Industrial Revolution crossed the North Atlantic, booming American cities were overwhelmed by the same dreadful crowding and pollution that characterized the European industrial capitals and had led to a proliferation of building, health and sanitation laws in nineteenth-century Europe. Yet as the United States embraced free-market capitalism more resolutely than other industrializing nations, its political climate was less receptive to government action. Thus, laws dealing with urban problems lagged behind (Knox & McCarthy, 2012; Power, 1989; Toll, 1969). Well into the late nineteenth century, nuisance laws (rather than health, building and zoning laws) were still the chief means of controlling the environment of American cities. The nuisance doctrine became the basis for the first generation of U.S. municipal laws that divided populations in districts, as I will discuss further. The other major source of zoning regulation were restrictive private deeds. These deeds, which were enforced by private neighborhood associations, date back likely to 1826, when a "Committee of Proprietors" congregated to preserve the character of Louisburg Square, an upscale subdivision in Boston.[16] Becoming widespread in the mid- and late nineteenth century, the deeds covered a broad range of issues, some of which later became standard fare in municipal zoning ordinances: e.g., they prohibited the sale or conversion of residential property to other uses, required setbacks, restricted building heights, and dictated that no more than one house be built per lot. They also mandated lawn-mowing and relegated the hanging of laundry to rear yards.[17] Some

[16] This is about a century after such covenants had proliferated in London.

[17] On private regulations, see: M. Weiss, *The Rise of the Community Builders: The American real estate industry and urban land planning*. New York: Columbia University Press, 1987; D. Young, *Common Interest Developments: A Historical Review of CID Development*, 1996. Accessed on March 10, 2013 at http://www.uwec.edu/geography/ivogeler/w270/cids.htm; R. Fogelson, *Bourgeois Nightmares: Suburbia, 1870–1930*, New Haven, Yale University Press, 2005; R. Fischler and K. Kolnik. *American Zoning: German Import or Home Product?*, 2006 Paper presented at the Second World Planning Schools Congress (Mexico City, July 11–16).

provisions sought either implicitly or explicitly to exclude "undesirable" people who tended to depreciate property values because of their "ignorance, incompetence, bad taste, or knavery", as the firm of the venerable landscape architect F. L. Olmsted put it.[18] Implicit exclusionary tools were those that set bulk and area criteria (such as minimum house and lot size), or required a minimum cost of construction. Explicit exclusionary rules prohibited non-Caucasians (and, on occasion, specific Caucasian groups) in the neighborhood outright. For example: "It is hereby covenanted and agreed by and between the parties hereto and it is a part of the consideration of this indenture … that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots."[19]

Building on the nuisance laws and private covenants, three primary methods of classifying populations and their housing developed in U.S. zoning ordinances of the early 1900s. In addition to local lineage, each of the three methods had international precedents. To recall from the introduction, the three methods are: segregating people and their housing by race, segregating them by different area standards, and segregating them based both on area standards and a typology of single- versus multi-family homes.

3.1 The Racial Ordinances

The first zoning method of segregating people in the United States—segregating them by race—started without explicitly mentioning race in the law but using it as a criterion for law enforcement. This approach was embraced by the first proto-zoning ordinances: those adopted in a string of Northern Californian cities, such as San Francisco and Modesto, from 1870 to 1890.[20] These cities extended what was then the standard method of controlling urban environments—nuisance law—to exclude certain types of business, especially laundry facilities, from the newly established residential zones and permit them only in industrial ones (Toll, 1969). For example, an 1885 ordinance declared that "it shall be unlawful for any purpose to establish, maintain, or carry on the business of a public laundry or washhouse where articles are washed and cleansed for hire, within the City of Modesto, except within that part of the city which lies west of the railroad track and south of G Street."[21] These ordinances led to a series of legal disputes known as the "laundry cases." There certainly were some valid public health and safety reasons to impose

[18] Cited by Fogelson, *Bourgeois Nightmares*, 124.

[19] Cited by R. Brooks and C. Rose *Racial Covenants and Segregation, Yesterday and Today*, 2010, 4. Accessed on September 12, 2012 http://www.nyustraus.org/pubs/0910/docs/Rose.pdf

[20] Unlike their twentieth-century counterparts, these ordinances were not comprehensive and citywide.

[21] Cited by W. Pollard, Outline of the law of zoning in the United States. *Annals of the American Academy of Political and Social Science* 155, Part 2: Zoning in the United States (1931): 15–33.

restrictions on the laundry buildings which served as places of both business and residence for their Chinese occupants. The laundries increased the risk of fire due to their extensive use of boiling water and heating irons at a time when most buildings were wood frame. But we can prove that safety was not the main motivation behind these ordinances because they were *never* applied to Caucasian owners, while being readily used to expel Asians in response to "Anglo" residents' concerns that the areas were "becoming clubs of the Chinese".[22] As the New York Heights of Buildings Commission reported in retrospect: "When [Los Angeles] had been districted about 110 Chinese and Japanese laundries found themselves in the residential district [where laundries were prohibited]. According to New York Heights of Buildings Commission (1913), the city immediately undertook to remove them to the industrial districts." Based on information obtained from Bither (1915), at a time when racism was not seen as evil, leaders of the California zoning movement spoke of the racial factor in the laundry ordinances openly and appreciatively: "We [Californians] are ahead of most states [in adopting zoning] thanks to the persistent proclivity of the 'heathen Chinese' to clean our garments in our midst."[23]

A couple of decades after the laundry cases, California's cities passed more comprehensive zoning approaches and took leadership of the movement in a different way, as we will see later. But circa 1910, the epicenter of racist zoning moved to Southern cities which, operating in a Jim Crow mode, wrote race into law for the first time in U.S. municipal zoning history. Baltimore—a city which had wide experience with racially restrictive private deeds[24]—was the first U.S. city to pass an explicitly racially divisive zoning code in 1910 (Boger, 2009; Manning & Ritzdorf, 1997). This zoning ordinance expanded the private deeds' restrictions to a citywide scale. It stated, in strikingly blatant terms:

1. That no negro may take up his residence in a block within the city limits of Baltimore wherein more than half the residents are white.
2. That no white person may take up his residence in such a block wherein more than half the residents are negroes.
3. That whenever building is commenced in a new city block the builder or contractor must specify in his application for a permit for which race the proposed house or houses are intended.

Baltimore Mayor B. Marhool was cited in *The New York Times* (1910), explaining the rationale behind the ordinance as follows: "Here in Baltimore we have a large colored population… Many blocks of houses formerly occupied by whites have now a mixture of colored—and the white and colored races cannot live in the same block in peace and with due regard to property security." Baltimore's lead was followed by a string of Southern cities: Atlanta, Louisville, New Orleans, Richmond, St. Louis, etc. But soon thereafter the idea to segregate housing areas on overt racial

[22] Ibid., 18.

[23] Bither was Director of the Manufacturers' Association in Berkeley, California.

[24] For instance, the neighborhood of Guilford Park, where no house could be occupied by "any person negro or of negro extraction." Cited by R. Fogelson, 65.

grounds was struck down. In 1917 the U.S. Supreme Court reviewed the 1914 ordinance of Louisville. It declared: "A city ordinance which forbids colored persons to occupy houses in blocks where the greater number of houses are occupied by white persons, in practical effect, prevents the sale of lots in such blocks to colored persons, and is unconstitutional."[25]

This did not end the pursuit of racial housing segregation via planning means. To begin with, some cities like Richmond kept their zoning ordinances unrevised for a few years after 1917, until another court struck them down (Manning & Ritzdorf, 1997). In most cases, however, the ordinances were changed but the racially divisive intent behind them was pursued through alternative means. For example, some local officials employed more careful racial labels in the new ordinances. Atlanta, for instance, revised its ordinance in 1922 to include the following classification: R1-white district, R2-colored district, and R3-undetermined. Its chief author, Robert Whitten, argued that segregation would instill in blacks "a more intelligent and responsible citizenship" and that racially homogeneous areas would enhance social stability (Manning & Ritzdorf, 1997). The hope was that by linking racial labels to neutral residential labels (R1, R2 and R3), the code would survive a court challenge. It did not. Other cities used racial classifications but *only* in their master plans (rather than in the zoning ordinances). This was the case of Austin, Texas in 1928 (Tretter, Sounny, & Student, 2012). Simultaneously, the popularity of racially loaded private deeds throughout the South practically exploded. Using constitutional and property justifications, the courts respected them for four decades, all the way until 1948.[26]

3.2 Housing Separation by Area Standards

The second method of segregation by zoning, which gained popularity a few years later, was subtler. This method involved using the area and bulk rules of zoning ordinances to relegate different forms of housing to different quarters of the city. As larger private houses constructed on larger lots and at lower densities were likely to be owned by higher-status people, the method could be utilized to create different areas dominated by different classes and therefore different races (since the two are related), but without explicitly referring to either class or race. Physical form

[25] Karst, K. L. Buchanan v. Warley 245 U.S. 60 (1917). *Encyclopedia of the American Constitution, 1*.

[26] In 1948, the Supreme Court ruled in Shelley v. Kraemer (334 U.S. 1) that privately induced racial housing segregation is legally unenforceable: "Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes… [are] violative of the equal protection clause of the Fourteenth Amendment." In reality, racist deeds became unlawful only after the Fair Housing Act of 1968. R. Brooks and C. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms*. Cambridge: Harvard University Press, 2013.

attributes, such as minimum lot areas and densities, could serve as proxies for social status.

This method was most prominently used in the first comprehensive and citywide zoning ordinance in the United States, New York's of 1916. Edward Bassett, a highly-respected lawyer and chief author of New York's ordinance, was this method's distinguished proponent.[27] New York's zoning resolution split the city into overlapping land-use, height and area districts—the types of districts that are very common in ordinances today. There were three types of use districts: residential, business and unrestricted. And there were six types of area districts, each with different standards for lot coverage: from the A district, which permitted 100 per cent lot coverage, to the E district, which permitted only 30 per cent lot coverage.[28] In residence districts, no building could be erected other than dwellings and a few types of civic structures (clubs, churches, schools, etc.) as well as hotels. But these districts made no difference between single- and multi-family homes. Dwellings were simply all those that housed "one or more families and boarding houses".[29] In its lengthy discussion pages, the report of the New York's Board of Estimate and Apportionment did speak of single- versus multi-family housing as separate types of habitat. It considered apartment buildings as something closer to stores and factories, than to homes: "[T]ake the case of the man who builds a home in a district which at the time seems peculiarly suited for single family dwellings. In a few years the value of his property may be largely destroyed by the erection of apartment houses, shutting off light and air and completely changing the character of the neighborhood. When single family dwellings, apartment houses, stores and factories are thrown together indiscriminately, the health and comfort of home life are destroyed and property and rental values are reduced".[30] Bassett, in his later writings, also explained that detached homes and apartments cannot co-exist: "A vacant unrestricted lot in a high-class district residential district had a high exploitive value." Without zoning, he went on, single-family areas would be "exploited by a dozen apartment houses," ostensibly causing decline in the values of the detached homes and worsening quality of life (Bassett, 1922a).

Yet despite the incompatibility of "private residences" with apartments that Bassett saw, the taxonomy did not enter New York's zoning resolution. Why? Bassett explained it clearly half a dozen years after the resolution was adopted. He did not believe courts would sustain an autonomous district for detached homes. Thus, he used the E area districts, which regulated area and bulk (e.g., setbacks, yard size, lot coverage) and overlapped with some of the residence districts, to achieve the same effect: "The E zones of New York… have been considered one of

[27] On Bassett and zoning, see Toll, *Zoned American*, and Power, *The Advent of Zoning*, among many other sources.

[28] New York Board of Estimate and Apportionment, *New York City Building Zone Resolution, Restricting the Height and Use of Buildings and Prescribing the Minimum Sizes of Their Yards and Courts*. New York: Author (1917).

[29] Ibid.

[30] Ibid., 72.

the most important results of the new [zoning] movement because they perpetuate the highly restrictive [i.e., high-class] residential developments. According to Bassett (1922a), in New York, it is not practical to put up any residential building on 30 per cent of the lot except a one-family private residence." In Bassett's view, the E districts gave constitutional cover to restrict an area to single-family housing without using the term. As he said, "One may ask why they are called E districts instead of private residential districts. The reason is that the method of creating districts from 100 per cent to 30 per cent is a plan employment of the police power with a recognition of health and safety considerations, and the courts will protect a plan which is based on such a foundation. In New York… an apartment house covering not over 30 per cent of the lot would be substantially as safe and healthful as a one-family house, although as a matter of practice landowners in E districts will not erect apartment houses (Bassett, 1922a)."

3.3 Enter the Single-Family District

Whereas 1916 New York remained on the safe side, another city, across the country, took the bolder step of putting on paper the single-family district that has since then so defined the American zoning tradition. The year was still 1916 and the city was Berkeley, California. The idea of carving a district exclusively for single-family homes surely did not come out of the blue. As we saw in the previous section, it was very much on the minds of the crafters of New York's resolution. Still it did not crystallize easily either. Initially, the idea was to distinguish one- and two-family homes, on one side, from apartments, on the other. Henry Morgenthau, Chairman of the New York City Commission on Congestion, proposed it at the very first National Conference on City Planning (Morgenthau, 1909): "We can make city plans establishing factory zones and residence zones… and then restrict certain zones to… one- and two-family houses." In 1913 the New York state legislature passed an act stating that residential districts could be limited to one- *and* two-family homes (New York Heights of Buildings Commission, 1913). Two cities in the state, Utica and Syracuse, created "residence districts" immediately thereafter (Scott, 1978) for both single- and two-family homes.[31]

But Berkeley carved space for the individual home more resolutely than others (Toll, 1969). Its 1916 ordinance included eight use districts, of which the first three were residential. In Class I districts, "no building or structure shall be erected, constructed or maintained which shall be used for or designed or intended to be used for any purpose other than that of a single family dwelling." The Class II district included single- and two-family homes and Class III permitted row buildings, along with single- and two-family homes.[32] Berkeley's code was drafted under the

[31] Some cities outside of New York and California, like Minneapolis, had similarly experimented with such zones.

[32] City of Berkeley, *Districting Ordinance No. 452-N.S.* Berkeley: Author, 1916.

leadership of architect Charles Cheney,[33] who believed that an "apartment house will condemn the whole tract…of fine residences."[34] The position was widely held by people of his class, including the other major activists, whose writings we find in Berkeley's brochures dedicated to zoning propaganda brochures from that time. J. Bither, the same who was cited earlier on the "heathen Chinese" in California, argued that "apartment houses are the bane of the owner of the single-family dwelling" (Bither, 1915). In the first petition that asked the city to apply Class I (single-family) regulations to a neighborhood,[35] the author Duncan McDafee[36] explained that his neighborhood must be restricted to single-family dwellings because this "will afford them a protection against the invasion of their district by flats, apartment houses and stores, with the deterioration of values that is sure to follow" (McDuffee, 1916).

A decade passed and in the landmark case of *Euclid v. Ambler*, the U.S. Supreme Court legally blessed Berkeley's approach (thus surpassing Bassett's expectations). The borders of the single-family district were firmly articulated. Apartments, along with stores, factories and all sorts of other "nuisances" were jointly defined as outsiders to the single-family district: "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that, in such sections, very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others… Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."[37]

From that point on, U.S. municipalities adopted exclusive single-family districts en masse. The federal government endorsed the idea as *the* norm, recommending that "zoning separate residence districts by homogeneous types of dwellings" and that residence districts be divided "for one-family dwelling districts, two-family dwelling districts, multiple dwelling districts", in order to "encourage the development of neighborhoods with such uniformity of type of dwelling as will secure the

[33] On his life and work, see F. Akimoto, Charles H. Cheney of California. *Planning Perspectives* 18 (July) (2003): 253–275.

[34] C. Cheney, "The necessity for a zone ordinance in Berkeley". *Berkeley Civic Bulletin* III(10) (1915), 165.

[35] This example shows that, at least in the United States, the border between public and private regulations is ambiguous. In Berkeley and many other cities at the time, a municipality would create zoning rules, but they would take effect only if residents petitioned it to apply them to their neighborhood. A version of public-private partnership in rule-making exists today in Houston. See C. Berry, Land use regulation and residential segregation: Does zoning matter? *American Law and Economics Review* 3(2) (2001) 251–274; M. Lewyn, How overregulation creates sprawl (even in a city without zoning). *Wayne Law Review* 50 (2004) 1171–1208.

[36] He was President of the Civic Art Commission.

[37] Village of Euclid, v Ambler Realty Co., 272 U.S. 365 (1926).

best social and economic conditions" (Gries & Ford, 1932). It also aided the idea in practice through myriad federal actions, such as those of the Federal Housing Administration, which for decades denied mortgages for areas that were *not* zoned for homogeneous types of housing (Whittemore, 2013).

4 Discussion and Conclusion

This chapter provided a brief review of how some major civilizations attempted to spatially separate the places of residence of their urban populations, typically granting a privileged spatial position to their elites. As we have seen, public rules to segregate populations span many centuries. But the specific rules applied, as well as the divisions deemed appropriate, varied widely in different contexts. Some civilizations saw a basic distinction between semi-divine royals and peasant mortals; others perceived a division between castes defined by birth and occupation; others imagined a mosaic of faiths, ethnicities and nationalities; still others viewed people as fitting into consolidated categories called "races," etc. In each civilization, the act of categorizing must have held immense powers. As Bourdieu (1989) put it, "the power to impose and to inculcate a vision of divisions, that is, the power to make visible and explicit social divisions that are implicit, is political power par excellence. It is the power to make groups, to manipulate the objective structure of society."

Upon this background, the chapter offered a chronology of the early twentieth-century American zoning movement that led to the idea of the single-family district as an autonomous category. The first zoning method that emerged in U.S. cities was based on explicit racial divisions: in Californian cities circa 1870–90 (mostly against Asians) and in Southern cities circa 1910–30 (mostly against African Americans). This method most closely resembled what had existed in other world civilizations, especially the European colonial empires: people perceived as belonging to different races were told bluntly to live separately.[38] But this method did not survive the constitutional test in the United States and this is testimony that, with its well-known flaws, early twentieth-century America had some democratic guards that the European empires had lacked. At this time, U.S. zoning shifted strategy. Rather than directly referring to the characteristics of *residents*, it focused on the seemingly more neutral characteristics of *residences* (e.g., house size and density). Within this strategy, two contemporaneous strains emerged. The first was exemplified by New York's 1916 ordinance, which relied on bulk and area characteristics to distinguish between districts. This was similar to what was common in Germany—the

[38] I have never found a quote from an early twentieth-century US zoning advocate admitting to have learned from the European colonial practices. I imagine such a confession would have been politically unacceptable. But this does mean that such "learning" never happened. Notably, racial separation in both America and the European colonies was justified in health, safety, and comfort terms (see Nightingale, *Segregation*).

primary country from which U.S. reformers were learning at the time. The second was exemplified by Berkeley's ordinance, also from 1916, which treated the single-family home as a distinct type of habitat that should not interact with others. Once the latter method was legally confirmed, it spread around the country. Over time, New York's and Berkeley's methods converged. The single- and multi-family districts in U.S. cities and suburbs were continuously divided into sub-types: single-family homes of various lot and bulk sizes, each in a distinct category and in a distinct quarter of the city, and multi-family buildings of various densities, also each in a distinct category and in a distinct part of the city.[39] But it is the autonomous single-family district that truly distinguished the U.S. tradition from those of other major industrialized nations. The Germans never used it vigorously in cities in their country. Apparently neither did the English (Hirt, 2013b), nor did the French (Hall, 2006). And as familiar as this category may sound to Americans and Canadians today, it apparently never before served as a fundamental organizing concept in city laws, as we saw in the earlier part of this chapter. In the remaining paragraphs, I will highlight two reasons[40] that may in part explain why the single-family zone came to play such a unique place in U.S. municipal regulation.

First, the single-family residential district established itself as an efficient covert instrument to overcome the democratic guards embedded in the U.S. Constitution. We could see this easily in 1922 Atlanta where, as mentioned earlier, Robert Whitten had hoped his ordinance would survive legal challenges if seemingly technical nomenclature (R1, R2, R3) is mixed with racial labels. Here is another clear example of thinking along these lines from the city pioneer in racial zoning, Baltimore. Baltimore's Assistant Civil Engineer, J. Grinnalds, believed Baltimore could overcome the legal challenge created by the 1917 Supreme Court ruling. In a Baltimore newspaper, he cunningly observed "the tendency of [a certain kind] of people to live in a certain kind of house." The recommended solution was a "scientific" survey of housing using the following types: one-family, two-family and multi-family: "Some sections of the city will show a preponderance of one family homes. Some will indicate that there is a considerable grouping into two family houses. Other neighborhoods will appear to be tenement or apartment districts almost as if by segregation." Then, Grinnalds argued, zoning would legally cement the existing de facto partition and prevent mixing of housing types (and thus, types of people) in the future (Grinnalds, 1921).

This ideology was not only linked to race. On the contrary, it was widely believed at the time that there is a "natural" order not only to all races, but also to all classes

[39] On how zoning districts subdivided and multiplied, see D. Elliott, *A better way to zone: Ten principles to create more livable cities*. Washington, DC: Island Press, 2008.

[40] The reasons I discuss are cultural. For an economic explanation of zoning, see W. Fischel, *The Homevoter Hypothesis: How Home Values Affect Government Taxation, School Finance and Land-use Policies*. Cambridge: Harvard University Press, 2001. My interpretation comes closest to C. Perin *Everything in Its Place: Social order and Land Use in America*. Princeton: Princeton University Press, 1977; M. Lees, Preserving property values? Preserving proper homes? Preserving privilege: The pre-Euclid debate over zoning for exclusively private residential areas, 1916–1926. *University of Pittsburgh Law Review* 56 (1994) 367–428; and Hirt, Home, Sweet Home.

and ethnicities[41] and that spatial divisions between them would serve the greater social good.[42] Aside from being a racist, Robert Whitten, for example, felt that: "Bankers and leading business men should live in one part of town, storekeepers, clerks and technicians in another, and working people in yet others where they enjoy the association of neighbors more or less of their own kind."[43]

But even if this was the case, was a single-family district necessary? Surely, a method like Bassett's, which used area criteria, could have just as well created separate zones for higher- and lower-class people without going through the trouble, legal or otherwise, of inventing a new category solely for single-family homes. So why bother write it into law and invite controversy?

The answer, I believe, is that early twentieth-century urban reformers (Bassett included) firmly believed that the American single-family home was a superior form of human habitat to the point that it had to be enshrined into law. Surely, individual homes located far from urban crowds were not an American invention. Bruegmann (2006) has shown how Roman elites cherished their out-of-town villas (while keeping urban dwellings too). And Robert Fishman (1987) has demonstrated that the English bourgeoisie, powered by new transportation technologies and informed by new social norms favoring the nuclear family, was the first in history to exit the city and move to permanent individual residences at the city's edge. But neither movement translated into widespread city laws for districts *only* for detached family homes.[44] It is in the United States that urban reformers had come to believe that mass living in detached homes is an integral part of the nation's civilizational identity.[45] The apartment house, regardless of whether it was rich or poor, was assumed to be *inherently* incapable of delivering the same social goods as the private detached home (Whittemore, 2013). The apartment was an unfit place to raise a family: not only did it bring "noise, street danger, litter, dust, contagion, light, air and fire risk",[46] but it was also "children-devouring" and "family-destroying."[47] And it ostensibly devoured children not just by fire or traffic accidents but also by moral

[41] The theories of the Chicago School are a good example.

[42] See also R. Fischler, Health, safety and welfare: Markets, politics, and social science in early land-use regulation and community design. *Journal of Urban History* 24 (1998a) 675–719; R. Fischler, Toward a genealogy of planning: Zoning and the welfare state. *Planning Perspectives* 13 (1998b) 389–410.

[43] Cited in Zoning in Atlanta, *Journal of the American Institute of Architects*, 1922 (10), 205.

[44] Note that only a quarter of dwellings in the United Kingdom are detached homes and that, as earlier said, the English never employed exclusive single-family zoning as did the United States.

[45] In the words of Andrew Jackson Downing, by building family "cottages," America could distinguish itself other "coarse and brutal people." A. Downing, "The architecture of country houses," *The suburb reader*, edited by B. Nicolaides and A. Weise. New York: Routledge, 2006 [1850].

[46] E. Bassett, "Present attitudes of courts toward zoning", in *Planning problems of town, city and region: Papers and discussions at the fifteenth National Conference on City Planning held at Buffalo and Niagara Falls, New York*. Philadelphia: Fell, 1923, 117.

[47] A. Crawford, "What zoning is," in *Zoning as an element in city planning, and for protection of property values, public safety and public health*, edited by L. Purdy, H. Bartholomew, E. Bassett, A. Crawford and H. Swan. Washington, DC: American Civic Association, 1920, 7.

corruption. The single-home family carried the paradigmatic values of American civilization and thus had to be defended as if it were a matter of defending the republic. As the New York's City Board of Estimate and Apportionment phrased it while advocating zoning, "preserving the values of civilization is a matter of keen state interest… It is important from the standpoint of citizenship as well as from health, safety and comfort that sections be set aside where a man can own a home and have a little open space about it. It makes a man take a keener interest in his neighborhood and city. It has undoubted advantages in the rearing of future citizens."[48] A few years later, in 1925, the Supreme Court of California, in endorsing Los Angeles's ordinance, which following Berkeley had created pure single-family zones, similarly proclaimed: "We think it may be safely and sensibly said that justification for residential zoning may… be rested upon the protection of the civic and social values of the American home. The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home… The home and its intrinsic influences are the very foundation of good citizenship". And by "American home," the judges meant *only* one type—the detached one housing an individual family (Whittemore, 2013).

Note the logical paradox that American zoning propagandists were setting themselves up for. On one side, many of them including Bassett, himself a man of modest origins, openly admitted that zoning was a tool of defending high-class interests. But on the other, if single-family homes would be available only to a small privileged class, how could America's civilizational values persevere? If indeed single-family homeowners "make good citizens," as Bassett (1922b) put it, yet few people fit that bill, wouldn't America end up with too few "good citizens"? Thus while acknowledging class exclusion by zoning, Bassett also praised zoning for helping increase the sheer number of ordinary citizens residing in private homes. This was, as zoning propaganda from the period widely claimed, because once an area was zoned only for single-family homes, a greater number of developers were willing to build them and a greater number of people could obtain mortgages to buy them. One of the best things about zoning, Bassett (1922a) argued, was that once zoned, cities were "rapidly building up with the [private] homes of the best of the citizens who are not wealthy." Exclusion mingled with populism—traits of U.S. zoning that still carry on.

This chapter demonstrated that zoning for residential segregation spans centuries. It was fed by imaginary divisions between gods and mortals, lords and peasants, and people of different castes, nationalities and colors. In the United States, the idea took a particular twist by centering on the perceived civilizational benefits of a particular physical form, the single-family home. The zoning methods that developed in the United States, as elsewhere, were never technical, normal or inevitable, and always the product of human values.

[48] New York's City Board of Estimate and Apportionment, *New York City Building Zone Resolution*, 20–22, 31.

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North-American Zoning: Real-Estate Regulation—Past, Present and Future

Raphaël Fischler

Abstract In the United States and Canada, zoning is primarily a tool for the regulation of real-estate development and only secondarily an element of city planning. This is so historically speaking—zoning was adopted primarily as a means of controlling nuisances that could lessen property values—and it is so in contemporary planning practice. As a regulatory tool, zoning is necessarily a local affair; but as a planning tool, it must necessarily become a supra-municipal one. Historical and contemporary material from Canada and from the United States buttress a critical argument on the past, present and likely future of zoning in these countries.

> Urban planning, as we once knew it, is over. The current urban revival happened with no master plan and no national urban policy framework, mostly through the "invisible hand" of market forces. An amalgam of development approvals, incentives, and exactions has arisen in the past several decades, largely in place of planning, to harness this private initiative to serve public policy goals. Imagine Boston and other recent urban plans acknowledge this change. These plans express an attitude toward growth, rather than fostering the illusion that cities can or should just decree what's going to happen where. (Kiefer, 2017)

These words, written by a land-use attorney in 2017, are an apt description of planning in the United States and in Canada—not just of recent planning, but of planning since its inception in the early twentieth century. They highlight the gulf that exists between the practical management of urban development and the ideals of long-range city planning, a gulf that is neither recent nor accidental but is inscribed in the DNA of American and Canadian planning and zoning.

In this chapter, I argue that in the United States and in Canada, too much is being expected of zoning because too little is being expected of planning. In the absence of ambitious urban policies to create a more socially, economically and environmentally sustainable city, North-American planners resort to zoning not only to shape the built environment but also to make the city more equitable, lively and

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green.[1] Zoning is the most important tool in their arsenal, but it is a weak one, unequal to the task at hand. I base these argument on some 25 years of study of planning and zoning in the United States and Canada, from my dissertation research in the early 1990s to my recent consulting work with public and private parties, from my archival research on the history of zoning in U.S. and Canadian cities to my work, over some 15 years, as member of the planning and design review commission of one of those cities. The sum of my findings and observations, in a nutshell, is that zoning is not planning but real-estate regulation. In an environment where market processes dominate and government interventions are constrained—a situation that was prevalent a century ago, underwent some balancing half a century ago and is again closer to its original state today; in an environment, in other words, where the private sector holds most of the cards and the public sector must play with a weak hand—in such an environment, zoning represents at the same time the poverty of planning and its best hope "to harness [...] private initiative to serve public policy goals."

1 The Origins of North-American Zoning

Although German cities were the first to adopt comprehensive zoning schemes to regulate private development and although American planning cited the German precedent approvingly in the 1910s (Mullin 1976), zoning in North-America is not a German import (Fischler, 2016; Kolnik, 1998). It is the product of local attempts to minimize externalities from urban development in the industrial era. In Germany, zoning was part and parcel of a large array of government policies to manage development and improve housing conditions (Ladd, 1990; Marsh, 1909; Sutcliffe, 1981). Across the Atlantic Ocean, where many of these policies were deemed beyond the political pale for the power they gave government over private actors, it had a more central and autonomous position. In a context of dominant laissez-faire ideology, proponents of strong state intervention were sidelined, while conservative reformers hammered out the pragmatic compromises with real-estate interest that would lead to a modicum of control over development (Boyer, 1983; Fogleson, 1986; Roweis, 1983). In fact, North-American zoning was the brainchild of real-estate developers and conservatives much more than of good-government reformers or radicals; its primary aim was to protect the property owner and the tax payer.

Contemporary zoning regulations have a very long and varied lineage. The "Coutume de Paris" (Parisian municipal regulations that were carried over into French Canada) and the Laws of the Indies (royal edicts concerning the establishment and design of cities in the Spanish colonies) helped to shape the earliest settlements in North America. Modern, comprehensive zoning in the United States

[1] I use the expression "North America" to designate the United States and Canada even though Mexico, too, is part of this continental region. I do so simply to avoid having to name the two countries repeatedly. For the same reason, I use "American" to refer to the United States, even though the adjectives applies to the whole continent.

and Canada grew more directly out of a variety of attempts to control the quality of the material and social environment in growing industrial cities. Starting in the early nineteenth century (and often earlier), municipal regulations helped to perform four principal tasks, all of which, in turn, served a fifth imperative. The first objective was to control threats to health and safety: regulations on human activities and building techniques helped to lessen the threat of fire, exposure to pollution and disease (Fischler, 1998a, 2007, 2014). The second was to manage the quality of streets and other spaces: setbacks and height limits helped to maintain unimpeded circulation and access to sunlight (ibid.). The third aim was to consolidate social distinctions in physical space: restrictive covenants, at first, and zoning codes, later on, helped to keep those perceived as social inferiors out of areas where they presumably did not belong (Fischler, 1998b; Fogelson, 2007; Weiss, 1987). The fourth objective, which gained prominence in the Progressive Era, was to improve the efficiency and reliability of municipal government: regulations were designed to rationalize municipal service delivery, and to minimize official discretion and, hence, abuse of power (Fischler, 2000a; Hirt, 2014). All these aims, together, served a fifth one: to shield property owners, principally homeowners, from losses to the use and exchange values of their assets and from excessive fiscal burdens, that is, to keep property values high up and keep property taxes low (Fischel, 2015). That is the single most important historical rationale for zoning in North America. Where skyscrapers were the most important real-estate assets at stake, as in New York City, zoning was tailored in particular to protect high-rise construction (Weiss, 1992). Where the single-family home was the primary object of public concern, zoning was fashioned specifically to protect the exclusivity of single-family residential areas (Hirt, 2014). One of the most important results today of this approach to zoning—from the earliest days of zoning to today—is the deep and lasting segregation of North-American cities by class and, in the United States especially, by race (Fischler, 1998b; Rothstein, 2017).

2 From Suburb to Metropolis

Two cities exemplify the range of municipalities that contributed to the advent of modern zoning in the early years of the twentieth century. One is a small suburb in Canada, the other the largest American city, indeed the largest city on the continent. One represents the countless North-American municipalities whose officials aimed to protect high-end residential areas from undesirable people, activities and buildings; the other stands for the handful of cities whose leaders worked to manage the impacts of high-density development in congested urban areas. Westmount adopted a comprehensive zoning code in January 1909; New York City did so in July 1916.

By 1909, Westmount, a bourgeois suburb of Montréal, had adopted regulations pertaining to land use (residential, commercial, industrial), housing type (detached and semi-detached family homes, attached or row houses, multifamily buildings), building height, distance from the street line, lot coverage and even floor area ratio (a standard first adopted in Westmount in 1899, that is, some 62 years before it was

used in New York City).[2] The original founders of Westmount (the municipality was first incorporated as a village in 1879) and its early-20th-century leaders were captains of industry, upper-level managers and professionals, staunch defenders of the British Empire and vocal proponents of good-government reform who used land-use and building regulations to create and protect a model community on the southern slope of Westmount hill (Bérubé, 2014; Bryce, 1990; Gubbay 1985, 1998). The social geography of the community corresponded to its physical geography: near the summit of the hill stood detached and semi-detached homes; on the lower slope and flat area at the foot of the hill, row houses were allowed, together with commerce on three specific streets; in the area, nearest to the tracks of the Canadian Pacific railway company, industrial structures and apartment buildings were permitted. This socio-spatial structure was soon complicated by the spread of upper-class apartment buildings in the flat area at the foot of the hill in the 1910s and 1920s and by the arrival in the 1960s and 1970s of tall office buildings in that part of the flat area nearest to a subway station.[3]

Tall office buildings were at the center of debates on land-use regulation in New York City (Weiss, 1992). Their increasing height and, especially, their increasing bulk made property owners and developers fear that their investments in lower Manhattan would be jeopardized by the erection of taller, bulkier structures that radically diminished access to light and air in adjacent buildings. At the same time, merchants of fashionable stores on Fifth Avenue reacted with alarm to the erection of manufacturing lofts on nearby streets and to the growing presence on their own avenue of garment workers whose dress, manners, speech and politics clashed with those of their respectable patrons (Makielski, 1966; Toll, 1969). Other property owners, too, wanted to see the value of their assets protected. Finally, officials and reformers sought to regulate land-development to prevent the spread of tenement buildings from Manhattan to the outer boroughs, to protect single-family housing areas and to increase the efficiency of infrastructure services (Fischler, 1998a; Revell, 1992). These various actors, each concerned with the spatial distribution and built form of new development, found common cause in the adoption of zoning. The regulation that they generated in 1916 represented a political compromise between proponents and opponents of government intervention in the market, a compromise that favored the laissez-faire side but still affirmed the principle that private development ought to be regulated in the public interest: it gave land owners massive development rights in most of the city, gave a modicum of protection to better-off commercial and residential areas, and imposed volumetric guidelines on tall buildings that minimized their solar impact on their surroundings (and helped to shape the iconic Art-Deco skyscraper) (Scott, 1971).

[2] Town of Westmount, By-law no. 103 "Concerning Building Areas and for Other Purposes," April 4, 1899. The floor area ratio of Westmount governed the size of multi-family projects, whose floor area had to be limited to the area of the lot. The measure was discussed in 1913–1916, when New York City planners were preparing the zoning code of 1916, but it was not adopted until the city revised its zoning regulations in 1961 (Fischler, 1998a).

[3] Of particular note is the Westmount Square complex, designed by Mies van der Rohe, which opened in 1967 and featured two residential towers and an office tower set on top of a commercial gallery and underground parking garage.

3 Zoning Before Planning

When Westmount and New York City adopted their zoning codes, in 1909 and in 1916, respectively, neither city had a master plan that spelled out its objectives or depicted its vision for the future. Such blueprints or goals were implicit in the zoning codes, not explicit, as planning theory dictates. And yet, as the City of Westmount makes clear in its current Master Plan, there is a hierarchical relationship between planning and zoning, between the Master Plan and the zoning regulation.

> The Westmount Planning Programme sets the directions for the planning and the development of the municipality. The Plan, and the implementation tools that flow from it (such as the zoning, site planning and architectural integration programmes and other bylaws), set the framework for the conservation, and in a few cases, the redevelopment, of neighborhoods, streets, buildings and open spaces. (City of Westmount, 2016, p. ii)

Zoning is an "implementation tool" for the Plan, as are other regulations, investments in the public realm and fiscal measures. In theory, therefore, zoning should come after planning. In practice, historically speaking, zoning came before planning.

In the years leading up to the adoption of the 1909 zoning code in Westmount, the available archival evidence does not show much concern for plan-making.[4] The vision of a "bourgeois utopia" (Fishman, 1989) is a matter of social consensus, but it is wholly embodied in restrictive regulations rather than in a positive plan. As a 1908 editorial from the Westmount News makes clear, the city's leaders are familiar with developments in the nascent field of planning, but their priority is to regulate private activity:

> The reason why Westmount is likely to fulfill its destiny as a model, residential, garden city, is, because it began as a small self-governing municipality, and, in accordance with the law of social evolution, passed through the town stage into the final stage of a city, having all the elements of permanency (1) an intelligent, cultured, well-to-do population, entrusted with the popular franchise; (2) property interests carefully safeguarded by charter, and (3) a universal desire among the citizens to make their municipality a City Beautiful.[5]

The comparison with the Garden City and with the City Beautiful are only superficial: of Ebenezer Howard's scheme for an alternative to the industrial city, only the low density and abundant greenery are present in Westmount; of the grand proposals modeled after the World Columbian Exposition of 1893, only the beautification of public gardens and private front yards is applied (Howard, 1965 [1898]; Wilson, 1994). Planning in Westmount is subsumed in regulation and beautification, the imposition of constraints on private development and the provision of public amenities.

In Westmount's far larger neighbor, Montreal, zoning grew incrementally from its humble beginnings as health and safety bylaws in the seventeenth and eighteenth

[4] During the three years preceding the adoption of the 1909 zoning code, the local newspaper, the *Westmount News*, provides no evidence of civic demand for planning, only of demand for control over land development and construction.

[5] "The City Beautiful," *Westmount News*, Saturday, June 13, 1908, p. 1.

centuries to more complex building and land-use controls after municipal incorporation in the 1830s[6] and to modern regulations in the twentieth century (Fischler, 2014). In the early part of the century, the city grew by amalgamating a large number of suburban municipalities (Linteau, 2013; Marsan, 1990). Among these municipalities was Notre-Dame-de-Grâce, which had developed regulations on residential districts quite similar to those of Westmount.[7] When Notre-Dame-de-Grâce was annexed to Montreal, the central city acquired not only additional land area but also state-of-the-art development regulations on residential districts. It soon started to designate "residential streets" in older neighborhoods, where municipal protection was granted on demand. But the patchwork nature of territorial growth was mirrored in the patchwork nature of land-use regulation. Even as the city instituted new controls to manage new forms of urban development—for example, it instituted bonus zoning for skyscrapers in 1967, six years after New York City did so—it kept adding provisions to its code in a piecemeal fashion. Only in 1991 did Montreal produce a streamlined, comprehensive zoning code. And only in 1992 did the city adopt its first official Master Plan. Toronto, too, added regulation to regulation for over a century before considering comprehensive zoning (Fischler, 2007). But it acted with a little more celerity than its rival, and in the right order, adopting its first Official Plan in 1949 and producing a comprehensive zoning code in 1954 (Fischler, 2007; Moore, 1978).[8]

The precedence of zoning over planning is even more clear in the case of New York City. Following the amalgamation of distinct municipalities into a giant city with five boroughs in 1898, the American metropolis saw much agitation for city planning. In 1913, city council appointed a Commission on Building Districts and Restrictions and established a Committee on City Planning. The recommendations of the former body were headed fairly rapidly: in 1916, the city adopted its famous comprehensive zoning regulation. Under the regulation, New York's municipal territory was divided into height, area and use districts, i.e., into zones differentiated according to building height (measured as a multiple of the width of the street on which a building stands),[9] according to land coverage (ratio of the area of the lot that

[6] The City of Montreal was first incorporated in 1832 but this initial incorporation was cancelled and a new incorporation effected in 1840.

[7] Notre-Dame-de-Grâce was a neighbor of Westmount, a larger municipality from which Westmount had seceded when it was first incorporated as a village. Several suburbs, including Outremont, copied Westmount's regulations in a more or less wholesale manner.

[8] Interestingly, both Montreal and Toronto produced metropolitan plans fairly early on. In 1950, French consultant Jacques Gréber prepared a plan entitled "Isle of Montreal, Comprehensive Plan, Proposed Layout," a blueprint for the growing region that prefigured future plans in its emphasis on the consolidation of urbanized areas (as opposed to sprawl). The plan consisted only in one large image; it came without a written report or strategy for implementation (M'Bala, 2001). Toronto acted even earlier: its Planning Board issued a "Master Plan for the City of Toronto and Environs," prepared by outside experts, in 1943 (White, 2016).

[9] Height maxima as multiples of the width of the street (the ratio varies from 1 to 2.5) apply to the structure at the street line. Higher floors had to be set back according to the angle given by the ratio, but towers could go up to any height if they did not cover more than 25% of the lot.

a building may cover) and according to use (residential, commercial, industrial or unspecified). On the other hand, the recommendations of the second committee, the Committee on City Planning, were not followed for a long time. They included the creation of a city planning agency to guide the growth of the city. Such an agency was first set up in 1930 but was given limited responsibilities and resources; it was abolished in 1933. A new agency, the City Planning Commission, was set up in 1936; it was finally given a staff, housed in a Department of City Planning, in 1938. The Commission and Department produced their first comprehensive "Plan for New York City" in 1969. The first step, the creation of the City Planning Commission, is described as follows on the city's website:

> The establishment of the City Planning Commission provided the structure for comprehensive planning in New York City, replacing a haphazard planning and zoning system that functioned principally through the interaction of interest groups and political forces. For the first time New York had a professional agency with a single purpose: to serve the people of New York by planning for the entire city. (City of New York, 2017)

Although it is a landmark ordinance, the 1916 zoning code does not mark the beginning of planning per se. Land-use regulation emerged as "a haphazard … system" produced by "interest groups and political forces," a form of regulation on demand that suited the needs of owners and developers and the ethos of free-market capitalism.

The temporal and institutional priority of zoning over planning is characteristic of the municipal politics of countless other cities. Only in a small number of cities did officials attempt to subordinate zoning to a master plan. With the 1909 Plan of Chicago, the Commercial Club of that city aimed "to anticipate the needs of the future as well as to provide for the necessities of the present: in short, to direct the development of the city towards an end that must seem ideal, but is practical" (Burnham & Bennett, 1909, p. 2). In a lengthy appendix entitled "Legal Aspects of the Plan," its authors investigated the ways in which municipal authorities could use the police power, the power of eminent domain and the power to tax and spend to implement the plan, i.e., to build the necessary public improvements and to so regulate private development as to create greater harmony and beautify in the city.

In Canada, similar efforts were made in cities such as Ottawa and Kitchener. (The comprehensive zoning code of Kitchener, adopted in 1924, is generally seen as the first of its kind in Canada, disregarding the experience of suburban municipalities such as Westmount.) However, Gerald Hodge and David Gordon confirm the subordination of planning to zoning in the Ottawa and Kitchener plans as well: "in both of these historic documents … the community plan's role was seen as providing support for land use regulations" (Hodge & Gordon, 2014, p. 97). In fact, they note, the following years saw "the widespread adoption of zoning bylaws without corresponding community plans" throughout Canada. One noteworthy exception to this pattern of zoning without planning was the 1928 *Plan for the City of Vancouver*, prepared by U.S. consultant Harland Bartholomew, whose "land use proposals were furthered by a sophisticated zoning bylaw" (p. 89).

The norm of zoning before planning prevailed in the United States (Scott, 1971). In the 1920s, Secretary of Commerce Herbert Hoover appointed an Advisory Committee on Zoning as part of his policy to increase the efficiency of the American economy, in part by means of the standardization of practices and products in all branches of industry, including real estate and housing (Fischler, 1998c). The Committee, made up of some of the planning pioneers who had been instrumental in housing and planning reform in the 1900s and 1910s, issued "primers" to diffuse zoning and of planning throughout the United States. Here, too, zoning came before planning: the *Standard State Zoning Enabling Act* was issued in 1926; the *City Planning Primer* came out in 1928 (Advisory Committee on Zoning, 1926, 1928). The members of the Committee made it clear that zoning ought to be part of planning. After noting that zoning would help avoid "this stupid, wasteful jumble" of unregulated urban development, they add:

> We must remember, however, that while zoning is a very important part of city planning, it should go hand in hand with planning streets and providing for parks and playgrounds and other essential features of a well-equipped city. Alone it is no universal panacea for all municipal ills, but as part of a larger program it pays the city and the citizens a quicker return than any other form of civic improvement. (Advisory Committee on Zoning, 1926, pp. 1–2)

Although zoning alone cannot improve American cities, it is a more efficient means of doing so than any other. Zoning became popular in large part because it did not cost much, certainly not in comparison with City Beautiful schemes whose costs doomed them to remain plans on paper in most cases, and because it could be a source of savings (Stelter, 2000; Van Nus, 1977, 1979; Wilson, 1994; Wolfe, 1982).

The fact that the exercise of the police power, contrary to the use of the power of eminent domain, did not require that compensation be given to owners for any losses incurred in the development potential of their property was a focal point of legal and political discussion in the advent of zoning and a major selling point in its adoption and diffusion (Fischler, 1998b). As industry and commerce grew increasingly mobile thanks to the advent of the truck and the car, demand for zoning spread as well (Fischel, 2015). "On January 1, 1926," the Advisory Committee on Zoning reported, "48 of the 68 largest cities in the United States, having in 1920 a population of more than 100,000 each, had adopted zoning ordinances, while most of the others had zoning plans in progress"; nearly 380 smaller municipalities had passed zoning regulations as well (Advisory Committee on Zoning, 1926, pp. 6–7). By 1926, then, the majority of the urban population of the US enjoyed "the protection and other benefits of zoning" (ibid, p. 7).

Advocates of zoning in the early years of the twentieth century included both conservative reformers such as Edward Bassett and Lawrence Veiller and radical ones such as Benjamin Marsh. Whereas for Bassett and Veiller zoning was essential to making capitalism and free markets compatible with the needs of family life and to limiting the "creative destruction" that they inflicted on valuable city properties, zoning to Marsh was an important but modest part of "City Planning in Justice to the Working Population," as he put it in the title of one of his articles (Marsh, 1908; Kantor 1983). Bassett and Veiller wanted to address the problems of the industrial

city with small-government and market-friendly policies; Marsh advocated stronger state interventions that curtailed private benefits for the sake of greater equity. Their opposition led to a split in the nascent planning professions (Marcuse, 1980), the conservatives winning the political battle for the mind of planners. In this manner as in others, the Progressive Era represented the "triumph of conservatism" over more radical forms of reform (Kolko, 1963).

4 Who Zones?

Although critics of land-use regulation bemoan government intervention in real-estate markets and blame if for shortages in the supply of land and of housing units (Cox, 2006; Glaeser, 2012), zoning was invented in large part by developers for developers. Advocates of zoning included not only reformers in the professions, in charitable or public-health organizations and in government, but also many members of the real-estate community. The debate over zoning in the first decades of the twentieth century pitted "better" developers and "responsible" owners, who took a long-term view of real-estate development, against speculative developers who cared only about one-time profits at the moment of sale.[10] Marc Weiss has shown that "community builders," i.e., the creators of large, upscale subdivisions, were instrumental in shifting the burden of protection from private covenants to public regulations (Weiss, 1987). In American and Canadian cities alike, zoning regulations to protected better residential areas from apartment buildings and other detrimental projects were a response to grassroots demand on the part of local owners. So, too, was zoning to protect industrial areas from encroachment by residential units whose owners would complain or even sue to protect themselves from nuisances, as was famously the case in Los Angeles, in the *Hadacheck* case (Kolnik, 2008).[11] And as we have seen, a very pro-business Secretary of Labor helped to diffuse zoning in order to rationalize land development and make it more efficient.

My own observations in Montreal between 1994 and 2016 match the historical findings of Marc Weiss in San Francisco from 1914 to 1928:

> The real estate industry in most large American cities was both for and against the establishment of zoning laws to regulate the use of property and the height and bulk of buildings. One faction of large developers generally favoured zoning laws. Big residential subdividers, the 'community builders', wanted public restrictions to control land uses surrounding their high-income subdivisions. Large commercial developers also supported use-zoning, but frequently opposed height limitations. Many smaller property interests, 'curbstoners', did not favour zoning at first, but once established, set about to manipulate

[10] The distinction between "good" and "bad" developers still matters today. At a recent public discussion on housing issues in the San Francisco Bay Area, the mayor of Albany, a municipality in the East Bay, declared that "there have been developers who merely seek to maximize profit irrespective of the community's needs," but that there also have been "developers who wish to work with the community and build environmentally friendly projects" (Jin, 2017, p. 1).

[11] *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

> the process to promote speculation as well as more intensive development. Most of the elite bankers, builders and brokers were hostile to urban 'machine' politicians and fought to keep the administration of zoning out of their hands. (Weiss, 1988, p. 311)

In Montreal, too, it is customary for developers to try and obtain variances to build at greater heights and higher densities. But the better-established developers have been strong proponents of clear regulations administered with fairness. In fact, when arbitrary decision-making threatened the public good, individual developers could be found among those who demanded respect for established rules. What developers expect, first and foremost, is predictability and efficiency, i.e., behavior on the part of municipal authorities that reduces risk and minimizes loss of time in the development process. Within limits, the contents of the rules matter less than the quality of their application.

Developers' activities in zoning are not limited to applications for development permits and requests for variances. They include, most importantly, contributions to the design of zoning regulations and the calibration of requirements. Developers and/or owners initiate zoning reform when change threatens their assets, as was the case in New York City in 1913–1916, and when new designs and technologies or new market demands require a relaxation or modification of existing requirements. Regulation in all industrial sectors, including that of real-estate development, involves consultation with producers in order to assess what or how much government can require without jeopardizing production by setting excessive technical demands or imposing prohibitive financial burdens. In his writings on housing reform, Lawrence Veiller advocated the use of regulation (as opposed to subsidies or public housing) to improve housing conditions for the poor, in particular the adoption of housing codes that would set thresholds of acceptable quality in new housing. But he also emphasized the need for patience in raising quality over time, without setting standards so high as to price new housing out of reach of working-class households (Veiller, 1910). Today, all major changes to zoning codes, especially the introduction of new regulations, involve intense consultations with representatives of the development industry and much lobbying on their part if consultations do not seem to yield the desired results.

When Montreal officials set out to design an inclusionary housing policy, they set up advisory committees with leaders of community organizations active in the housing sector, with local experts and with residential developers. On the basis of their meetings, the consensus they felt was politically feasible was a policy of targets rather than of requirements: for developments over 200 units in size, developers would be asked, not required, to dedicate 15% of the project to affordable units and another 15% to units of social housing (Ville de Montréal, 2006).[12] The request would be given weight by a "trick" used by many planning departments: keep zoning allowances in development density low, force developers to apply for variances to do projects that meet their density targets and use the request for a variance as

[12] Affordable units are typically small units whose sale price falls below a certain threshold. Social units are produced by a community-based housing organization on a parcel, within the site, donated by the developer.

leverage to get the developer to help implement the inclusionary housing policy. Here, too, developers have displayed different attitudes: some have played the game in earnest, taking the 15–15% targets as givens, and have worked with planning staff to create high-quality projects for all parties involved; others have been reluctant partners, at best, and have tried to do the least possible while still meeting their own objective in terms of floor area.

Although zoning represents government intervention in private real-estate markets, it is, historically speaking, a response of municipal corporations to requests from property owners and developers. In some cases, for instance in the protection of single-family residential areas, it is literally provided on demand. In other cases, for example in the promotion of affordable housing in new projects, it is still produced in a deliberative process that involves the producers of real estate as a major political force. Developers hate risk more than they hate rules; to the extent that rules reduce risk, they are welcome. That is why zoning was originally conceived as a mechanism to augment certainty in private development and in government intervention. Thus regulations had to be clear and had to minimize discretion on the part of municipal officials, especially where the public had little trust in the ability and/or probity of officials (Fischler, 2000a; Hirt, 2014). At the same time as they want certainty, though, developers want flexibility, the ability to respond creatively to the particular characteristics of their site or to changing circumstances. This need, which stands in direct contradiction to the need for predictability in the approval process and in the life of their assets, can be met in two ways: by allowing for exceptions to be made and by designing regulations that allow for greater discretion on the part of regulators. The first mechanism was made part and parcel of modern zoning from the start, as a judicial, political and functional "safety valve" to avoid penalizing some owners unduly and expose the municipality to lawsuits (Williamson, 1931). The second mechanism, though present in limited ways in early building and housing codes, became key to some forms of land-use regulation in the second half of the twentieth century, most evidently in the United Kingdom, but also in North America (Booth, 1996, 1999).

5 Qualitative Norms and Discretionary Controls

The diffusion of discretionary controls was fueled by the broadening of the scope of zoning. In 1916, commenting on the recent *Hadacheck* decision, in which the use of the police power to protect the residential character of neighborhood was deemed constitutional, Lawrence Veiller declared:

> For the first time in American jurisprudence we have a statute of this kind sustained, not on the basis of public health nor public safety, but on that novel, broad and sweeping ground, "the general welfare."
>
> This opens a door, a crack, which may be opened very wide. How wide it may be opened few in United States can tell. (Veiller, 1910, p. 153)

When the prohibition of non-residential development in residential areas was legitimated as a measure benefiting the general welfare, and not just as a means of controlling nuisances, reformers and officials received a green light to try and expand the scope of municipal regulation to address what we would now call "quality of life" issues.

The shift from quantitative standards to qualitative norms after World War I and, even more so, after World War II, characterized public policy in general (Fischler, 2000b). As economic growth helped to raise living standards and standards of housing, planners started focusing less on questions of health and safety and more on what the British referred to as "amenity." Here is how the British legislator explained the rationale for the Planning Act of 1909:

> To secure proper sanitary conditions in the development of land has been, during recent years, the aim of numerous statutes, by-laws, regulations and local Acts, and a great improvement has no doubt been effected, but all such provisions are necessarily in-elastic in measure as they are general in their scope and application. Moreover, they are not concerned with amenity and convenience, except in so far as proper sanitary conditions may be considered to be implied by those terms. Town-planning schemes, on the other hand, will be prepared with special reference to the actual circumstances of each particular case, and amenity—the quality of pleasantness—will, in addition to adequate sanitary arrangements, be a conscious object of effort. [...] As a further development of, and indeed an important adjunct to, sanitation and convenience, it will now be remembered that a pleasant environment is an important factor in public health, and its provision a true economy. Every effort should be made when developing land for human habitation, not only to preserve to the utmost every object of natural beauty, but to so plan and guide the development itself as to produce a pleasing and harmonious result, a locality preserved, designed and built in accordance with the best conceptions of architectural and artistic beauty.[13]

As important as they may be, quantitative standards can only do so much to create proper living environments. Artful urban design is needed to respect the *genius loci* and/or provide a pleasant living environment. Such a plea had already been made by Camillo Sitte in the late-nineteenth century, when standardization and engineering were starting to gain predominance in the laying out of cities (Sitte, 1965 [1889]), and it was being echoed in North America by the proponents of the City Beautiful (Wilson, 1994). The balanced view expressed in the British Planning Act of 1909 was diffused in Canada and in the U.S. by Thomas Adams, who had been Secretary of the Garden City Association and first President of the Royal Town Planning Institute. Adams became a consultant to the Canadian government in 1914, helped to write planning legislation for several Canadian provinces and was the founding president of the Town Planning Institute of Canada. He moved to the United States in 1923 and was put in charge of the Regional Plan of New York and Its Environs a few years later (Simpson, 1985). The metropolitan plan he helped to draft drew inspiration from a review of the state of the art in planning in the late 1920s. One of the elements of the 1929 *Plan* was Clarence Perry's monograph on

[13] The Housing, Town Planning, Etc. Act 1909, 9 Edward 7 c.44, chapter 1. The Planning Act of 1909 became the basis for provincial planning acts in Canada in the 1910s. In fact, the language of Canadian acts mirrors the language of the British act closely (Hodge & Gordon, 2014).

the Neighborhood Unit, which Perry presented as a response to "The Rising Demand for Quality in Housing Environment" and a "new thirst for quality in every phase of life" (Perry, 1974 [1929], pp. 31, 33).

The inclusion of qualitative, and therefore subjective, aspects of urban development in the purview of municipal regulation started early in bourgeois suburbs, where aesthetics were deemed fundamental and the private practice of design control first arose through restrictive covenants (Fogelson, 2007). Westmount set up an Architecture Advisory Committee in 1916, made up of four architects (local residents), the City Clerk, the Building Inspector and the Mayor, in order to submit all building permit applications to design review and ensure that new homes and other structures would contribute to the aesthetic appeal of the municipality (Bryce, 1990).[14] In the United States, the initial resistance of courts to approve uses of the police power for purposes of urban design was soon broken, and regulations that aimed to create an attractive urban environment were soon justified as means of contributing to the general welfare. Historic preservation, which became a topic of interest in the nineteenth century, was integrated in land-use regulation on a large scale in the 1950s and 1960s. Environmental protection, which had become an object of attention at the start of the twentieth century, became important in regulatory systems in the 1960s and 1970s; more recently, a concern with climate-change mitigation and adaptation further expanded the environmental mandate of land-use planning and regulation. Public health, which had been an important issue in housing and planning reform at the turn of the twentieth century, mostly in relation to contagious diseases such as tuberculosis, became important again at the turn of the twenty-first century, this time in relation to obesity and associated ailments.

Where possible, authorities rely on quantitative standards to control land development and construction—whether they are formulated as specification standards or as performance standards (Kendig, 1980)—because they increase certainty. This advantage has been duly noted by the proponents of one of the most recent innovations in land-use regulation, the form-based code. As land-use classifications inherited from the industrial era become less relevant, as mixed uses become more attractive from a functional, social and environmental point of view, as public concern grows with the quality of the public realm, and as planners and developers alike cherish certainty and speed in project evaluation, New Urbanists are calling again for non-discretionary controls that give shape to attractive built environments (Katz, 1994).[15] However, as said, not all aspects of the built environment can be regulated by means of quantitative standards. Even where tradition lay in non-discretionary controls, as in the United States, the multiplication of public policy goals, together with the increasing scale of development projects, has pushed municipalities to

[14] Westmount's efforts in land-use regulation and design control paid off: the residential portion of the city was designated a national Historic Site in 2016 for being "emblematic of the Victorian and post-Victorian suburb in Canada on account of its overall [architectural] diversity and [landscape] integrity" (Government of Canada, 2016).

[15] The principles of the New Urbanism and of development regulation by means of form-based codes can be found on the website of the Congress of the New Urbanism (www.cnu.org) and of the Form Based Code Institute (www.formbasedcode.org), respectively.

adopt discretionary controls under which various considerations, some of them hard to quantify, can be considered concurrently (Selmi, 2009).

The growth of discretionary controls was made possible by (and in turn has fostered) the professionalization of the planning workforce. Planned unit developments, development agreements and similar regulatory tools offer flexibility in the design of large projects but put an onus on professional planners, on their knowledge of spatial, function and economic aspects of land development and on their negotiation skills (Smith, 1988). Planners in charge of development control by means of discretionary tools cannot act or be seen as mere technicians who apply unambiguous rules; they must be able to apply wise judgment and be respected as partners in the design of projects. This change in professional ability and public perception, in turn, was made possible by the development of professional planning education and the consequent diffusion of planning knowledge from a small cadre of national experts in the early twentieth century to a growing community of professional planners after World War II.[16]

In large North-American cities, a multi-layered system of actors, using a multi-layered system of standards and norms, participates in the regulation of urban development. In Montreal, traditional zoning regulations control land use, development density, building height, land coverage, setbacks, courtyards, signage and parking; performance criteria on shade and wind impacts regulate the shape of tall buildings, while performance criteria on traffic impacts affect site plans; in specific districts, additional regulations pertain to facades (shape and area of windows, type of cornice, etc.) and/or to the architectural and urban-design integration of the project (which is evaluated by means of qualitative norms such as "compatibility"); and large projects are subject to development agreements in which the site plan is examined in detail. In short, planners and members of planning advisory bodies use an array of quantitative standards and qualitative norms of non-discretionary and discretionary tools to assess projects. Although the bulk of evaluation is done on the basis of explicit criteria, some of it is based on explicit criteria: members of planning advisory committees (the *comité consultatif d'urbanisme* in each borough and the Comité Jacques-Viger for the city as a whole) assess the quality of projects and the merit of requests for variances or changes in zoning regulations by considering all criteria they deem relevant (except for architectural taste) as architects, urban designers, urban planners and landscape architects. In meetings of advisory committees, developers and their professionals display a range of attitudes, from defiance of unwanted meddling in private development decisions to acceptance of the

[16] The nascent field of planning was dominated by a small number of oligopolistic firms that drafted Master Plans and zoning regulations throughout North America (Fischler, 1993, Appendix A). Although professional planning institutes were created in the 1910s (in 1917 in the United States and in 1919 in Canada), it took several years for universities to establish professional programs in urban planning (starting in 1929 in the US, at Harvard University, and in 1947 in Canada, at McGill University).

need to balance public and private interests, from eagerness to jump through another administrative hoop without delay to sincere gratitude for constructive feedback that improves a project.[17]

6 Private Development and Public Benefits

In 1961, New York City rewrote its zoning code. It finally introduced the floor area ratio (FAR) as a regulatory standard, nearly 50 years after it was discussed among architects and planners in the city and over 60 years after it was adopted by officials in Westmount. More important, the new code borrowed a technique developed in Chicago a few years earlier to stimulate office construction in the loop: in exchange for providing a publicly accessible outdoor space in their projects, developers were given permission to build larger projects than normally allowed under current zoning rules (Morris, 2000). As in 1916, New York City regulators looked to best practices to create new norms: in the same way that the slender tower on a wider base, a form enshrined in the first zoning code, was becoming developers' response to the problem of land congestion in downtown Manhattan in the 1910s, so did the monolithic tower set on an open site appear as a new prototype of Modernist design in the late 1950s. The Seagram Building of 1958, among others, showed officials and planners that private development could yield public benefits, in this case a plaza that provided light and air in an otherwise increasingly congested Midtown. Under the new rules of 1961, allowable densities were lowered so that extra floor area became attractive to developers: they could make up for the "loss" of density by claiming extra floor area in exchange for a plaza or an arcade.[18] Bonuses were soon granted for other amenities such as on-site access to the subway and through-block passages. In New York and other cities, incentive zoning also was applied to promote historic preservation (Costonis, 1974), in particular the preservation of old theatres, and, perhaps most significantly, to foster the development of affordable housing (Lassar, 1989; Morris, 2000). Cities such as Vancouver have developed system of density bonus zoning and of "Community Amenity Contributions" to be

[17] These remarks are based on the author's personal observation as a member of the Comité Jacques-Viger from 2012 to 2017.

[18] For every square foot of plaza and of arcade, developers could build up to an extra 10 sq. ft or an extra 3 sq. ft of office space, respectively (depending on the area). The bonus program proved very successful—at least for developers, who obtained nearly $48 of additional property value for every $1 spent on plazas (Kayden, 1978), but much less so for the public, which received much space of poor quality. Revisions in the bonus zoning program were necessary to ensure that the quid pro quo had a better outcome for the public (Whyte, 1988). In Montreal, where developers had started to provide plazas, too, at the foot of their monolithic office towers (Lortie, 2004), bonus zoning was not a success: existing density standards were too generous relative to market demand, making bonuses less attractive to developers and leaving them unused (Boyce, 2001).

made in exchange for zoning changes.[19] Like Vancouver, many other cities where strong development pressure is putting housing out of reach of many households have adopted inclusionary housing programs, whereby developers build or pay for affordable housing (on-site or off-site), and in some cases also linkage fees programs, whereby the developers of commercial projects contribute to an affordable housing fund to compensate for the impact of their projects on local housing markets (Williams et al., 2016). Others, like Los Angeles, have adopted practices of community benefits agreements, voluntary contracts between developers and community groups that pertain to employment, job training and other socio-economic demands of marginalized communities (Been, 2010).

Where they can, municipal officials follow William Whyte's advice: what is truly important to the public good should be demanded of all projects, not traded for special advantages granted to specific ones (Whyte, 1988). Of course, economically speaking, the demands have to be such that they do not stifle development. In addition, legally speaking, they must be based on evidence of a direct causal link (or "rational nexus") between private project and public benefit, and their provisions must be calibrated on the basis of the likely impact of the project.[20] From 1916 to 2016, the name of the game has remained the same: to achieve the best possible deal with developers, both in writing new regulations and in assessing individual projects. Regulation must have a degree of flexibility in the face of complexity and change, and large projects must be subject to qualitative review; making project-specific deals therefore remains necessary. But the best possible deal in the writing of new regulations, one could argue, yields regulations that do not require making deals on individual projects.

7 From Conservative to Progressive Zoning

The idea that private development could be regulated to obtain public benefits is as old as building regulation itself: we have always demanded that builders or developers respect community interests, that they contribute to public health, safety and welfare, that they build in such a way as to make the urban environment more attractive, less costly to service and more supportive of economic development. What changed in the 1960s is not only the manner in which benefits are obtained—by means of incentives and not just by means of prohibitions or other strict demands—but also, more significantly, the benefits themselves and the political context in which they are sought.

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[19] See City of Vancouver, "Density Bonus Zoning" at http://vancouver.ca/home-property-development/density-bonus-zoning.aspx and "Community Amenity Contributions" at http://vancouver.ca/home-property-development/community-amenity-contributions.aspx (both last accessed on May 26, 2017).

[20] This double test of regulations is often referred to as the Nollan-Dolan test, after the two US Supreme Court decisions that established it in jurisprudence, *Nollan v. California Coastal Commission* (1987) No. 86-133, and *Dolan v. City of Tigard* (1994), No. 93-518. See also Kayden 1991.

For the first time in decades, if not in a century, during which zoning served the interests of property owners and developers and was applied to foster social segregation, zoning is being used for redistributive ends and for the purpose of social integration. The change is due to changes in municipal politics, most notably the success of progressive coalitions to elect progressive mayors (e.g., Tom Bradley in Los Angeles, Harold Washington in Chicago, Jean Doré in Montréal), and a growing belief in the value of long-term sustainability, even among some developers (Portland being the prime example of a city where a pro-planning consensus has developed [Abbott, 2001]). But the change is also due to economic and political shifts that undermine the Welfare State, increase social and economic needs in urban areas and force municipalities to attend to policy problems which they are, fiscally speaking, not equipped to address. Whereas most early planners insulated planning from the progressive politics of their day, letting housing reformers, social workers and others take care of social need, many planners in recent years have merged planning and progressive politics, working in parallel with non-governmental and community-based organizations to compensate for the effects of market processes and for the fraying of the social safety net. Lacking proper revenues, cities must tackle social problems and are looking for resources where they are, e.g., in real estate.

The great irony of contemporary zoning is that a tool adopted in American and Canadian cities to a large extent by conservatives for conservative purposes is being used by progressives to further progressive ends. Of course, there always was a progressive potential in government intervention in real-estate markets; but that potential was poorly used, to say the least. And now that some are trying to exploit it better, its limitations are becoming abundantly clear. There is only so much that inclusionary zoning regulations, linkage fee programs and community benefits agreements can contribute to addressing the challenges of the post-industrial city, much like there was only so much zoning codes could do to address the problems of the industrial city. Then as now, tinkering with zoning and other municipal bylaws, however useful they may be, is not good planning and certainly not good urban policy. John Reps already said so half a century ago, when he wrote a “Requiem for Zoning” (Reps, 1964). State/provincial (or national) policy is where the real action is, where progressive municipal policy is often being undone (Barton, 2012) and where, on the contrary, it can be fostered by means of legal planning mandates and land-use and infrastructure policies. Montreal has been able to limit the impact of growing economic inequality thanks to the persistence, despite their weakening, of provincial and federal social-welfare policies, thanks to rent-control bylaws that have not been undermined politically or judicially, as has been the case in California, for instance. Montreal has also been able to limit suburban sprawl in part thanks to Quebec’s intervention in municipal affairs, including the imposition of agricultural zoning (i.e., the shift of some zoning powers from municipal to provincial hands) and of

minimum thresholds of development density in local zoning ordinances (Fischler & Wolfe, 2012).[21]

Montreal's recent experience also shows that, whereas in theory planning ought to occur prior to zoning and, historically, zoning took place before planning, today, in practice, zoning and planning are done together. As we have just seen, long-range planning is done in part by the provincial government and is implemented by means of limitations or requirements imposed on municipal zoning. In addition, Montreal's Master Plan includes a land-use map and a map of maximum building densities. These maps show land uses and densities, respectively, in broad categories; zoning maps provide more specific information. Thus, proposed development projects must be assessed both against the Master Plan and the zoning code. If the administration wishes to approve the construction of a condominium building with an FAR that exceeds the maximum FAR set in the Master Plan (and in the zoning code), it must amend the Master Plan. In Montreal as elsewhere, development pressure from individual developers is often the impetus for planning. In other words, planners often plan in response to signals from the private market. A lack of human and financial resources and of political support (and perhaps a tendency to work in closed offices rather than in the field) hampers planners in the task of monitoring local conditions and updating plans wherever change is starting to occur. Thus, planning for change is often done, at least at first, by means of zoning.

The impact of zoning changes and variances on long-range planning has recently been highlighted in Los Angeles, where the Coalition to Preserve LA put an (unsuccessful) initiative on the ballot to ask that zoning be made subservient to planning:

> The Coalition to Preserve LA is a citywide, grassroots movement that aims to reform L.A.'s broken, rigged and unfair planning and land-use system through the Neighborhood Integrity Initiative, which has been placed on the March 7, 2017, ballot.
>
> For too long, deep-pocketed, politically connected developers have controlled City Hall by shelling out millions in campaign contributions to L.A. politicians, who, in return, grant "spot-zoning" approvals for mega-projects that are not normally allowed under city rules.
>
> Ordinary people, who have little clout at City Hall, suffer the consequences—increased gridlock traffic, the destruction of neighborhood character and the displacement of long-time residents, including senior citizens on fixed budgets and lower-income Angelenos.
>
> With the Neighborhood Integrity Initiative, the Coalition to Preserve L.A. aims to reform City Hall by winning reasonable controls back for all Angelenos.[22]

To lessen the impact of individual zoning decisions on the city and on the planning system, the Neighborhood Integrity Initiative aimed to subject zoning to long-range planning again, i.e., to stop the practice of "spot zoning" and adopt a "timeout"

[21] Agricultural zoning was adopted in 1978 (*Loi sur la protection du territoire agricole*) and metropolitan requirements on local development densities were imposed in 2011 (Plan métropolitain d'aménagement et de développement). Similar actions were taken in Ontario, where the provincial government issued the *Greenbelt Act, 2005* and the *Places to Grow Act, 2005* to establish growth boundaries and impose density requirements in the Greater Golden Horseshoe region of Toronto and Hamilton.

[22] Preserve LA, http://2preservela.org (last accessed on May 27, 2017).

for all development that does not "adhere to zoning" while the City drafts "a rational citywide plan for Los Angeles, called a General Plan, with updated Community Plans tied directly to infrastructure limitations, true population figures and community desires."[23] Although the initiative was driven by a strong NIMBY sentiment, it relied on good planning theory: survey before plan, zoning after plan.[24] In practice though, long-range planning and ad-hoc regulation always occur concurrently, in response to change on the ground. Officials react to trends in urban development which are first experienced on the front line of project approval; a significant project or an accumulation of projects calls for changes in plans and in regulations; the scale and scope of the adjustment vary from minor and local to major and city-wide. Officials also respond to policy imperatives (e.g., addressing a crisis of housing affordability, the loss of competitiveness, the treat of climate change); they do so with the tools at hand which, at the municipal level in North America, are primarily related to the management and taxation of land use (Peterson, 1981). Thus, the politics of zoning are at the same time the politics of real-estate regulation and the politics of social, economic and environmental sustainability. There is a schizophrenic quality to planning practice, caught as it is between technical control of real-estate projects and political action in the face of societal change.

8 Conclusion

From the preceding discussion of patterns and trends in zoning, there appear to be wide gaps between the theory of zoning, its historical record and its contemporary practice (Table 1).

In theory, zoning is a regulatory tool used to implement the community's vision for its future. In practice, it is to a large extent deal-making with developers. It is not

Table 1 The theory, history and practice of zoning

Theory	History	Practice
Planning before zoning	Zoning before planning	Zoning and planning together
Zoning for health, safety & welfare	Zoning for social & economic capital	Zoning for taxes & public benefits
Fixed rules with exceptions	Growth of discretionary rules	Zoning as deal-making
The city zones, developers build	Developers zone and build	Many stakeholders zone

[23] Preserve LA, http://2preservela.org/neighborhood-integrity-plain (last accessed on May 27, 2017).

[24] "Survey before plan" is the well-known expression of Patrick Geddes. It is the same point that members of the Comité Jacques-Viger made to Montreal planning staff on several occasions: a non-conforming project that is likely to have a significant impact on its surroundings should not be approved as an exception, thanks to a zoning variance or a local change in plans and regulations, but should be seen as a trigger for long-term planning for the future of the whole area.

surprising that the first U.S. president to come from the field of real-estate development (Donald Trump) is a president who wants to make deals, not policy. Of course, he will also make policy, and that policy is likely to leave cities to their own devices in the face of growing inequality and environmental threats, making them more reliant on real-estate development as a source of public income and benefits. A century after planners willingly or unwillingly gave planning a narrow mandate, contemporary planners must try to achieve important things with limited means. They are creatively using a tool of conservative urban policy to further progressive goals, responding to sometime unreasonable expectations on what zoning can deliver. The local problems they are attempting to remedy require responses from higher levels of government, including both policies that will empower municipalities to do more and policies that will constrain their abilities to do as they please.

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The Missing Link in the Evolution of Zoning

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Abstract The centennial of the 1916 New York City Building Zone Resolution provides an exceptional opportunity to reconsider the regulatory and legal basis upon which the key governmental power of zoning is founded. The motive to control the various market externalities embedded in land use regulation, from effects on commercial activity to changes in housing prices, has practically guided local governments in the United States from the very first days of zoning. Yet at the same time, such considerations of market externalities remained in the shadows of explicit zoning law and policy, as the discussion was re-routed to the allegedly more stable foundations of zoning, such as control of environmental, fiscal, or social externalities. This chapter identifies the missing link in the evolution of zoning, showing how the control of market externalities has had an unsung yet powerful impact on the zoning power from its early days.

1 Evolution of Zoning in Retrospect: The 1916 NYC Building Zone Resolution

Zoning was introduced in the United States—and quickly became established—during the first three decades of the twentieth century. Historical accounts of zoning regularly identify three key milestones in its early regulatory and legal development.

The 1916 New York City Building Zone Resolution ("1916 Resolution")[1] is considered to be the first comprehensive scheme to divide an entire city into zones, in which permitted land uses, building volumes, height restrictions, and other details were regulated. The second stage was the nearly uniform adoption of the 1926

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[1] City of New York, Board of Estimate and Apportionment, Building Zone Resolution (adopted July 25, 1916).

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Standard State Zoning Enabling Act (SZEA)[2] and the 1928 Standard City Planning Enabling Act (SCPEA),[3] through which states granted localities the power to regulate land use. The third prong was the 1926 U.S. Supreme Court decision in *Village of Euclid v. Ambler Realty Co*.,[4] in which the Court validated zoning as falling within government's police power. The Court held that the exercise of the zoning power is constitutionally valid, unless such provisions "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[5]

Over the following decades, federal and state courts generally tended to frame the policy purposes, and consequent legal contours, of the zoning power as falling within the scope of health, safety, morals, and general welfare—with the latter, broad term allowing courts to give local governments significant leeway in exercising their zoning power. While courts have examined whether a particular zoning scheme meets the "substantial relation" test, and have otherwise developed a thick body of law on the potential application of the Takings Clause[6] to the regulation of land use, they have generally refrained from an elaborate analysis of the underlying goals of zoning (Fischel, 2015). When federal and state courts have agreed to dig into the proper purposes of zoning, they have framed the analysis within a certain set of justifications for zoning. These premises focused on the legitimacy of zoning in controlling several types of externalities that may result from the unregulated development of land. As Sect. 2 shows, the types of externalities that courts have focused on are conceptualized in the literature as: (1) technological or environmental externalities, (2) fiscal externalities, and (3) social externalities. In contrast, judges have rarely explicitly addressed the underlying goals for zoning related to "pecuniary externalities" or "market externalities" resulting from unregulated land development. This is so even though such market effects often motivate cities to employ their zoning power.

At the outset, the 1916 Resolution may demonstrate how, alongside considerations of environmental, fiscal, and social effects, the enactment of the Resolution was also practically driven by a concern over market effects. This concern may shed light on the true motives of members of the real estate industry and business owners who were "anxious to put an end to the damages wrought by uncontrolled development." They were joined in their efforts by planning advocates, professional reformers, and public officials, who had different agendas, focusing on environmental and social concerns. Progressives and reformers viewed zoning as a means to limit "untrammeled capitalism" and to make the city more beautiful and livable (Fischler,

[2] United States Department of Commerce, Advisory Committee on Zoning, A Standard State Zoning Enabling Act (revised ed. 1926).

[3] United States Department of Commerce, Advisory Committee on City Planning and Zoning, A Standard City Planning Enabling Act (1928).

[4] 272 U.S. 365 (1926).

[5] Ibid., pp. 389–390, 395.

[6] United States Constitution, Amendment V, §3.

1998). The broad coalition in favor of the 1916 Resolution was thus driven by very different motives.

To start with, owners of downtown office buildings increasingly lost their access to sunlight and air to new skyscrapers, thus decreasing their rental value. This loss of sunlight had a dramatic impact, because up until the 1940s, sunlight was the principal source of illumination for interiors (Willis, 1995). The scope of such externalities was considerable: the forty-story Equitable Building, completed in 1915, cast a shadow over four high-value blocks (O'Flaherty, 2005). To control this externality, the 1916 Resolution imposed height limits and setback requirements. As Sect. 2.1 shows, responses to various technological or environmental externalities became the mainstay of zoning concerning both land uses and building restrictions.

A second type of concern that drove the 1916 Resolution demonstrates how technological or environmental issues can become meshed with "social externalities" (presented in Sect. 2.3 below). Owners and operators of high-end retail stores along Fifth Avenue were concerned about the entry of manufacturing lofts, which employed many poor immigrant women. Their fear was that the mass presence of working-class women on the streets would deter the stores' wealthy clientele and undermine the area's appeal. Framed, however, as a problem of incompatible uses, the city was divided into three types of use districts: one reserved solely for housing, another open to commerce, and a third allowing industry (O'Flaherty, 2005). Social segregation was thus indirectly promoted through zoning.

A third problem involved fiscal externalities, namely the growing pressure that the rapid private development of real estate placed on the city's public infrastructure. Both in the financial district and on Fifth Avenue, development caused acute street congestion. Human congestion also posed health threats in both tenement areas and office buildings. Moreover, the congestion issue coincided with the city's effort to unite the five boroughs by an integrated public transit system. Placing limits on building volumes was therefore intended to serve the broader goal of dispersing the population into outer areas, which would in turn facilitate the inter-borough layout of the public transit system (Fischler, 1998).

Further, the constant movement of different populations and activities made it difficult for school authorities to allocate children to particular schools. The mix of land uses also increased the costs of policing, fire-fighting, street maintenance, and postal delivery. The division of the city into use-districts, as well as limiting building volumes, was thus essential to provide more permanent structure to the city's neighborhoods and allow for a well-functioning infrastructure. As Sect. 2.2 shows, fiscal zoning has since then become an explicit regulatory principle.

At the same time, market externalities were also at play as a motivating force for the 1916 Resolution, although their role has been formally overshadowed by the other considerations mentioned above. In 1916, the New York office market went through a period of high vacancy rates, exacerbated by the 1.2 million sq. ft of the Equitable Building (O'Flaherty, 2005). Owners of existing buildings thus wanted to limit new construction that might cause a drop in rents or drive up vacancy rates (Fischler, 1998). Concerns over the stability of real estate values were not constrained,

however, to corporate and retail areas in the city. The 1916 Resolution sought also to protect residential properties, and in particular the single-family home, considered to be the apex of the hierarchy of land uses. The motives for doing so included a mix of technological or environmental concerns stemming from incompatible uses; social motives derived from the view of zoning as a "moral system that both reflects and assures social order"; and market-based concerns over the price effect of over-development on existing homes.

Despite the practical effect of market externalities—presented in Sect. 2.4 below—on the motives for the 1916 Resolution and the details of the zoning plan, this purpose has not been explicitly discussed in formal documents published in the aftermath of the 1916 Resolution.

In a speech delivered on November 24, 1916, to members of the National Municipal League, Robert H. Whitten, Secretary of the Committee on the City Plan, Board of Estimate and Apportionment in New York City, elaborated on the purposes and features of the Resolution. Starting with what he considered to be self-evident, Whitten noted: "That a public garage, stable or factory should be permitted to invade and destroy one after another the best residential blocks of the city seems wasteful and foolish" (Whitten, 1917, p. 325). He further stated that regulating the intensity of building development is "essential in order to assure to each section of the city as much light, air, safety from fire and relief from congestion" (ibid., p. 332), again pointing to environmental justifications for the top-down regulation of land development through zoning.

Whitten then explained the ties between the distribution of population and the layout of public infrastructure, and public transportation in particular, addressing both efficacy and costs involved with providing public infrastructure to service residents, businesses, industry and so forth. He thus addressed the fiscal externalities that are mitigated through planning and zoning. Finally, Whitten pointed to social and moral considerations at the basis of the Resolution, stating that "the enlightened civic and moral sense of the community demanded that the former haphazard method of building development should cease and that a comprehensive plan for the control of city building should be adopted" (ibid., pp. 332, 335). However, control of potential market effects was not explicitly presented by Whitten as one of the pillars of zoning.

Differentiating between the various motives for zoning may prove a difficult task in examining individual instances of government action. As Huanshek and Quigley (1990, p. 177) note: "[a]s an empirical matter, it is extremely hard to sort out the pecuniary from the externality motives for zoning." This chore is nevertheless essential, especially to the extent that one type of motive seeks to hide behind another, more defendable ground. This is especially so with pecuniary or market externalities, which have largely remained a legal blind spot, although they play a significant practical role in zoning. Section 2 sets out to analyze each of the aforementioned types of externalities. Section 3 underscores the role of land use regulation in controlling market externalities as the "missing link" in the evolutionary analysis of zoning.

2 Externalities and Theories of Zoning

2.1 Technological or Environmental Externalities

The British economist Arthur Pigou formalized the concept of technological or environmental externalities in the early twentieth century (Pigou, 1932). During the second half of the twentieth century, scholars have increasingly examined the policy and legal implications of such externalities. Since then, this concept has become the subject of extensive scholarship (Sun & Daniels, 2014). Economists define a technological/environmental externality as the "indirect effect of a consumption activity or a production activity on the consumption set of a consumer, the utility function of a consumer or the production function of a producer." The term "indirect" relates to an effect that "does not work through the price system" (Laffont, 2008).

Such externalities can be positive, such as when a firm makes available a new technology or information that allows other firms to manufacture improved products or to cut costs (Dari-Mattiacci, 2009). Negative externalities, which have attracted more attention in the public policy and law context, prominently include adverse environmental effects. Air pollution is probably the best-articulated example. Other technological or environmental externalities, which have a particular bearing on land use, have also been investigated in both theory and practice: noise, groundwater pollution, and the blocking of sunlight or the flow of air (Coase, 1960; Calabresi & Melamed, 1972).

A key point in understanding the role of technological or environmental externalities in land use regulation concerns the intricate ties between the zoning power and otherwise legally actionable harms, such as private or public nuisance. On the one hand, zoning emerged as a top-down regulatory mechanism that controls in advance certain aspects of conflicting land uses, which might otherwise lead to nuisance litigation. Legislatures and courts have explicitly articulated the close ties between zoning and nuisance control from the early days of zoning. As the U.S. Supreme Court famously noted in the *Village of Euclid* case: "a nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[7] Zoning is thus justified as a mechanism that spatially orders land uses to minimize potential cases of nuisance.

Accordingly, zoning is intended to save on transaction costs that parties may incur in trying to privately resolve land use conflicts, or on the costs of nuisance litigation. As a doctrinal matter, the fact that an activity is "properly conducted at a place authorized for it under zoning" would regularly shield it from a private nuisance claim, although the case might be somewhat different for some types of public nuisance. One further link between zoning and nuisance control concerns the "nuisance exception" doctrine, which stipulates that some types of land use

[7] 272 U.S. 365 at 388.

regulations might not constitute a taking of property even if they proscribe, without compensation, preexisting activities that amount to "harmful or noxious uses."[8]

Nevertheless, the zoning power may go well beyond nuisance control (Ellickson, 1973). Zoning regulates various types of technological or environmental externalities that do not amount to nuisances or other civil wrongs.

For example, a zoning decision may impose a density limit to control several issues, including the level of traffic congestion within a development and its vicinity. Nuisance law does not regularly hold a car user liable for the potential externalities she may cause to other residents or drivers because of increased congestion. It is not a type of behavior in which the law identifies a "wrongdoer" engaging in a harmful conduct toward others. In fact, this is a type of behavior in which the law is aligned with Coase's view of nonconforming uses or externalities as having a "reciprocal nature," meaning that we cannot categorically identify a "wrongdoer" and a "victim" in such scenarios (Coase, 1960). The solution for the lack of clear guidance by private law mechanisms is provided by regulation. One possible venue is a congestion fee, in which car users internalize the marginal externalities they generate by the payment of a time-based fee (O'Flaherty, 2005). This is feasible for toll roads, bridges, and tunnels, which serve as transportation arteries. However, it is not regularly the case with residential neighborhoods, in which residents are tied to a specific place, meaning that fees would not self-resolve congestion problems. Zoning establishes the level of building density that is seen as appropriate for such developments, also considering on-site and off-site roads, parking, etc.

Zoning thus deals with technological or environmental externalities that go beyond nuisance control. The same holds true for other land use regulations, such as aesthetic controls. Any such regulation would have to meet the "substantial relation" test, set up in the *Village of Euclid* case, but the underlying goals of zoning may well exceed nuisance control.

The role of zoning in controlling technological or environmental externalities thus bears an important lesson for the other grounds for zoning, discussed in the following Subsections. The legitimacy of zoning is not dependent on demonstrating that a certain developer or a person who uses the land engages, or is about to engage, in wrongful conduct (in the private law realm). At the same time, to justify constraints imposed by a zoning scheme, the local government must provide a rationale for the ways in which land uses and building volumes are regulated. Moreover, the farther away from conduct that would otherwise be considered wrongful, the more the municipality would have to ground such constraints in a broad-based rationale. As Sect. 4 will show, this insight has key implications for regulating market externalities through zoning.

[8] This doctrine, while controversial and not fully articulated by courts, originates in the pre-zoning-era case of Mugler v. Kansas, 123 U.S. 623 (1887). The Court refused to apply the Takings Clause to a regulation that prohibited the manufacture and sale of liquor in Kansas, a prohibition that applied also to existing breweries. It reasoned that the regulation stopped an activity that was "injurious to the health, morals, or safety of the community." In Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978), Justice Rehnquist in dissent referred to this exception but described it as applying only to "noxious uses." Ibid., pp. 144–146.

2.2 Fiscal Externalities

According to the 2012 Census of Governments, state and local governments in the United States continue to rely heavily on their own sources in order to create revenues to finance their expenditures (United States Census Bureau, 2012). For local governments, taxes represent the largest source of general revenue. Property taxes are most prominent, accounting for 73.5 percent of all local tax revenues. Between 2007 and 2012, local property tax receipts increased by more than 15 percent.

The prominence of local revenue—and property tax in particular—for local government finance has always had important implications for land use policy (Lehavi, 2006). In making zoning decisions, local governments may often want to ensure that "households or firms generate a fiscal surplus, not a deficit" (O'Sullivan, 2009). Thus, in considering whether to approve a new zoning scheme, a local government may be motivated to compare its expected marginal expenditures and provision of public services with the expected marginal public revenues.

In the residential context, suburban localities have often resorted to zoning mechanisms, such as minimum lot size or other density limits, to thwart indirect fiscal deficits. Such localities are often especially anxious about households that purchase small-size properties with a value below community average—and thus pay lower property taxes—but otherwise have high demand for public infrastructure, and schools in particular. The practical result of large-lot or other low-density zoning is one in which lower-income households with school age children would be largely left out of the community. In this sense, the fiscal motive plays an essential role in such types of exclusionary zoning. The fiscal tradeoff would be different for high-value properties. The same may hold true for retail businesses that yield not only property tax revenues, but also sales tax receipts (Schwartz, 1997).

The SZEA empowers local governments to engage in fiscal zoning in the residential context, by allowing them to control various aspects of private development, including the size of the lot, a building's height, or its contribution to overall density. Moreover, local governments do not have to ground zoning rules, such as minimum lot size, explicitly in fiscal considerations. The reasons for minimum lot size can also be for positive environmental externalities—because people value open spaces between houses—so that such zoning rules may otherwise promote the *Village of Euclid* case's notion of "general welfare."

In some cases, however, the question of legitimacy of fiscal zoning becomes explicit. The most prominent example is "exactions," requirements that "developers provide, or pay for, some public facility or other amenity as a condition for receiving permission for a land use" (Been, 1991). Notwithstanding the various complications entailed in this body of case law (Fennell & Peñalver, 2014), as most recently expressed in the Supreme Court case *Koontz v. St Johns Water Management District*,[9] the focus of the legal debate on exactions can be conceptualized as involving the legitimate scope of government control over fiscal externalities.

[9] 133 S. Ct. 2586 (2013).

Prior to the *Koontz* decision, the benchmark for the judicial review of exactions was established in *Nollan v. California Coastal Commission*[10] and *Dolan v. City of Tigard*.[11] In *Nollan*, the Court invalidated a California requirement conditioning a building permit for a beachfront property on the owner granting a public easement along the mean high tide line. The Court held that such an exaction lacked an "essential nexus" to the project's anticipated effects.[12] In *Dolan*, the court held that a substantial nexus does exist between a request to expand a hardware store and pave a parking lot and the city's requirement to hand over a piece of the property for a public flood plain and a bicycle path. However, the Court found that the scope of the exaction lacked "rough proportionality" to the expansion's impact.[13] A failure to meet the tests of "essential nexus" and "rough proportionality," respectively, triggers the Takings Clause. The Court based its rulings on the "unconstitutional conditions" doctrine, by which government may not condition the granting of a discretionary benefit on the applicant's waiver of a constitutional right—in this case, payment of just compensation for the property interest in land taken by the city.

In *Koontz*, a 5-4 majority applied the *Nollan/Dolan* framework to a case in which the petitioner was denied a permit request to develop 3.7 acres of privately owned wetland.[14] The denial followed Koontz's refusal to make a payment to finance the improvement of the drainage on another tract, owned by the government. The majority applied the *Nollan/Dolan* standards and the Takings Clause to this required payment, reasoning that "the demand for money burdened petitioner's ownership of a specific parcel of land."[15] This exaction was thus materially different from tax liability. Following *Koontz*, any exaction imposed on a private owner, whether in the form of a property interest in land or a monetary obligation, must meet the essential nexus/rough proportionality standard.

What does the jurisprudence on exactions demonstrate about the legitimacy of land use regulation, aimed at controlling fiscal externalities resulting from private developments? The *Nollan/Dolan* standard validates such a fiscal motive in principle, provided that the measure taken corresponds in both nature and scope to the specific fiscal externality generated by the proposed development. Even under such a heightened standard, therefore, the control of fiscal externalities would be considered legitimate.

A question that remains open in the aftermath of *Koontz* is whether the *Nollan/Dolan* framework applies only to a requirement made on an "ad hoc basis upon an individual permit applicant" or also to a "legislatively prescribed condition that applied to a broad class of permit applicants."[16] If the *Nollan/Dolan* framework is limited to only "ad hoc" or "adjudicative" situations—as the California Supreme

[10] 483 U.S. 825 (1987).

[11] 512 U.S. 374 (1994).

[12] *Nollan*, 483 U.S. at 837–42.

[13] *Dolan*, 512 U.S. at 391–95.

[14] *Koontz*, 133 S. Ct. at 2592–93 (Alito, J.).

[15] Ibid. at 2599.

[16] See California Building Industry Association v. City of San Jose, 351 P.3d 974, 991 (Cal. 2015).

Court recently held[17]—this means that "legislative" land use measures, such as a zoning ordinance, would enjoy the deferential "substantial relation" standard and would not implicate the Takings Clause. In such a case, the legislative measure would have to create a general framework for holding proposed developments accountable to the fiscal externalities they are expected to generate. The challenge for such a legislative measure would not be gaining the legitimacy to rely explicitly on fiscal considerations. It would lie, rather, in the ability of a broad-based ordinance to anticipate the marginal fiscal externalities of a range of specific projects. As Sect. 2.4 and Sect. 3 will show, this is exactly the challenge that applies to the regulation of market externalities.

2.3 Social Externalities

The previous Subsections have already touched on the various ways in which zoning rules, otherwise grounded in considerations of environmental or fiscal externalities, may lead to exclusionary social practices—with low-income households being the usual victims. However, the scope of social motives for zoning exceeds socioeconomic stratification, or even covert issues of race and ethnicity. A municipality, especially one politically dominated by current homeowners, may engage in various methods to preserve social order through zoning. It would be particularly legitimate to do so when those affected by such measures do not belong to a constitutionally protected suspect class, and when the social motive can be complemented by—or even hidden behind—the control of environmental or fiscal externalities.

A notable example is the *Village of Belle Terre v. Boraas* case,[18] in which the U.S. Supreme Court upheld the village's restriction of residential land uses to one-family dwellings based on the ordinance's definition of "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit."[19] As a result, a village homeowner was barred from leasing his home to six college students.

The Court rejected equal protection and other constitutional claims against the zoning measure, and relied on a mix of environmental and social externality rationales. It reasoned that "a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." The Court also held that "the police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[20]

[17] Ibid. at 991–92.

[18] 416 U.S. 1 (1974).

[19] Ibid. at 2.

[20] Ibid.

According to the Court, therefore, the negative externalities generated by a house occupied by college students comprise both environmental and social externalities, and the village could legitimately control them. Next to urban problems of congestion and noise, the Court viewed the presence of housekeeping units outside the scope of a "family"—as the zoning measure defined the term—as adversely affecting the village's "values." While controversial, this decision seems to give a mandate to at least some sort of social planning via zoning.

However, social planning via zoning need not be necessarily about exclusion. In fact, the growing phenomenon of "inclusionary zoning" measures, by which localities require or encourage developers to include below market price units in residential projects, is embedded in a concept of positive social externalities. The U.S. Department of Housing and Urban Development (HUD) has long adopted a policy, according to which the "integration of affordable units into market-rate projects creates opportunities for households with diverse socioeconomic background to live in the same developments" and to have access to the "same types of community services and amenities" (HUD, 2013).

Beyond the static concept of social justice, by which low and modest-income households are able to afford housing in high demand areas, the rationale of inclusionary zoning also features a dynamic component that deals with positive social externalities.

An underlying assumption that drives inclusionary zoning is positive synergy between different socioeconomic groups, serving mostly the interests of low and modest-income households, and children in particular, while not harming upper-income households. Mixed-income neighborhoods thus arguably come closer to a socially optimal interpersonal spatial design (Fennell, 2009). While such inclusionary zoning mechanisms have had a fair number of critics, and existing data does not always point to success (HUD, 2011), the positive social externalities remain a driving motivation of housing policy.

A 2015 decision by the California Supreme Court, *California Building Industry Association v. City of San Jose*,[21] highlights both the current features of inclusionary zoning and the way such schemes are viewed as entailing positive social externalities. In 2010, the City of San Jose enacted an inclusionary zoning ordinance, requiring developers of 20 or more housing units to sell 15 percent of the for-sale units at a price affordable to low and moderate-income households.[22] The ordinance offered developers several alternatives to the provision of on-site affordable units—such as provision of a higher number of off-site affordable units, or payment of a substitute fee—but strongly pushed developers toward the on-site alternative. Upholding the ordinance, the Court identified the ordinance's legitimate purposes not only of increasing the number of affordable housing units, but more particularly, of "assuring that new affordable housing units that are constructed are distributed throughout

[21] 351 P.3d 974.

[22] San Jose Municipal Code, §§ 5.08.10-5.08.730.

the city as part of mixed-income developments in order to obtain the benefits that flow from economically diverse communities."[23]

The Court further viewed the requirement to sell 15 percent of the for-sale units at an affordable price as a condition that "simply places a restriction on the way the developer may use its property," similar to other land use regulations or a rent control ordinance, restrictions that do not amount to exactions. The Court reviewed the ordinance under a "reasonable relationship" standard, so that the city did not have to demonstrate the *Nollan/Dolan* nexus between the development and the additional need for affordable housing.[24] Following the *California Building Industry Association* decision, a government's use of on-site inclusionary zoning to promote positive social externalities in mixed-income neighborhoods is not subjected to heightened scrutiny of its fiscal motives.

As a final note, in 2015, New York City's Mayor Bill de Blasio unveiled his plans to enact a citywide ordinance that will require all developers seeking to rezone land for housing to build a specific number of on-site affordable units (Goldenberg, 2015). The inclusionary zoning provisions are "hard, new requirements that for the very first time set a floor for the affordable housing communities are owed in new developments." The focus on on-site units seeks to promote the social externalities of mixed-income housing. The program was approved by the city council in March 2016.[25] Accordingly, the promotion of inclusionary social externalities in New York City is no longer done by ad hoc requirements, but instead through a citywide policy anchored in zoning laws. The promotion of positive social externalities is now explicitly enshrined in the zoning power.

2.4 Pecuniary / Market Externalities

Alongside the analysis of technological or environmental externalities, economists have also considered the role of pecuniary externalities, which work through the price system (Laffont, 2008). In a market economy, certain activities by persons or firms change relative prices or affect the value of assets. These changes create benefits for, or impose costs, on third parties. Economists regularly argue that pecuniary externalities do not affect welfare economics. They suggest that "the ability of new firms to enter an industry and inflict pecuniary losses on existing firms is the process that generates efficiency in competitive markets" (Holcombe & Sobel, 2001). Allowing firms to inflict losses on competitors may be viewed as necessary for economic efficiency. Because market actors have property rights over the resources

[23] 351 P.3d 974 at 979.

[24] Ibid. at 987–91.

[25] New York City, Mandatory Inclusionary Zoning (March 22, 2016). The text of the decision is available at: http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/approved-text-032216.pdf.

they own, but not over their future value, they are not entitled to compensation for pecuniary losses inflicted on them by other market actors.

Over the past decades, however, some economists have acknowledged that in the realistic world of imperfect markets, pecuniary externalities may have welfare effects. Paul Krugman has notably shown that in a world of imperfect competition and increasing returns to scale, pecuniary externalities do matter (Krugman, 1991). Market-size effects are a particular source of pecuniary externalities with genuine welfare impacts, and these in turn have substantial implications for siting choices of firms and the ordering of land uses (Martin & Sunley, 1996).

Krugman examines manufacturers, whose industries, unlike agricultural producers, are typified by increasing returns to scale and a relatively compact use of land. Manufacturers generally prefer to locate factories near their demand markets, because this saves them on transportation costs. The source of the demand, however, does not come only from the agricultural sector or from end-consumers. It is also derived from within the manufacturing sector itself. The result is one of agglomeration or geographical concentration, and it is embedded in positive, reciprocal pecuniary externalities. On the supply side, "manufacturer production will tend to concentrate where there is a large market, but the market will be large where manufactures production is concentrated." On the demand side, firms will tend to "live and produce near a concentration of manufacturing production because it will then be less expensive to buy the goods their central place provides" (Krugman, 1991).

Accordingly, the demand for certain land uses, and the regulatory considerations that need to be taken into account in ordering land uses, might implicate market externalities that have genuine welfare effects. Consider, for example, a plan to rezone agricultural land, located at the fringe of an industrial zone. The developer intends to set up an industrial plant that will manufacture steel products. In deciding whether to approve such a development, the municipality should consider not only technological or environmental externalities, such as increased pollution, or fiscal externalities, such as increased pressure on public roads, but also potential market externalities. If the presence of the steel plant will benefit other industries already located in the adjacent industrial zone—serving both the demand and supply side of the industrial products market—this positive market externality should be considered.

This does not mean, of course, that the concentration of similar land uses will always generate positive market externalities with an overall welfare effect. This is especially true concerning retail businesses, in which the issue of an internal supply and demand of products among businesses themselves is less relevant. Market externalities will apply mostly to the effect that businesses have on other businesses in positively or negatively attracting customers. Several studies have examined the effects of large retail businesses on revenues of other retailers and local employment rates, coming at times to different conclusions: some works seek to document the adverse effects that Wal-Mart stores have on other retail firms and total retail employment (Neumark, Zhang, & Ciccarella, 2008), while other studies show positive pecuniary externalities that large retailers generate for nearby retail establishments (Benmelech, Bergman, Milanez, & Mukharlyamov, 2014).

In a recent study of the effects of big-box retailers on nearby establishments, Shoag and Veuger (2015) offer a theory that seeks to bridge previous studies. They argue that while the overall pecuniary effects of large retailers are positive, directly competing retailers are economically harmed by the presence of a big-box store. The businesses that are positively impacted by their presence are ones that depend heavily on foot traffic, such as small retailers or restaurants. This also means that such positive externalities are negatively correlated with distance from the big retailer, meaning that such positive effects will be particularly significant within approximately a one-mile radius. Moreover, this positive dependence has welfare effects, because many of these affected businesses cannot relocate in the event that the big-box store closes down.

From a broader perspective, localities making zoning decisions should consider three types of market externalities: (1) welfare effects, (2) distributive effects, and (3) "second-hand" off-site environmental or fiscal externalities.

First, developers' siting choices and resulting zoning decisions may yield market externalities with a genuine welfare effect. Importantly, adjacent land users, who may be positively or negatively affected by a decision to rezone land, or to otherwise approve a certain development, should not be seen as having an enforceable individual legal interest concerning market externalities. Adversely affected competitors should not be entitled to block a development because of potential market externalities, the same way that positively affected land users are not in a position to force the municipality to approve the project. Yet zoning goes beyond identifying specific legal interests that may be otherwise enforceable or actionable. Just as considerations of technological or environmental externalities extend beyond the prevention of nuisances that would be otherwise actionable in private law litigation, so do market externalities merit a consideration by local governments if such externalities entail potential welfare effects.

Second, the distribution of positive market externalities, notwithstanding aggregate welfare effects, may also be a legitimate consideration in zoning decisions. Economists have tended to view such distributive grounds suspiciously, suggesting that the political process may allow powerful industries to protect their pecuniary interests at the expense of promoting overall welfare, such as by blocking competing land uses (Holcombe & Sobel, 2001).

As the next Sections show, there is indeed room for concern when decisions driven by market externalities seek merely to serve as an anticompetitive, or an otherwise protectionist measure, at the expense of competitors and other stakeholders. Yet distributive considerations that stem from market externalities should not always be considered normatively inadequate, especially when they are grounded in broad-based policy decisions. To the extent that inclusionary zoning schemes are grounded in such market externalities, and are part of a broad-based policy that addresses access to housing, the consideration of market externalities and their distributive effects may be legitimately weighed in such decisions.

Third, market externalities may also indirectly generate second-hand off-site technological or environmental or fiscal externalities. Section 3 analyzes the effects that a big-box store, such as IKEA or Wal-Mart, may have on small retail businesses

located in the city's Central Business District (CBD). A land use decision approving big-box development may create adverse market externalities for nearby businesses. In some cases, the closing down of a critical mass of retailers and related businesses, such as restaurants, may cause the CBD to decline. Such an urban decline may have long-lasting effects that also feature adverse technological or environmental or fiscal externalities—ones that take years and much effort to reverse (Faulk, 2006).

This does not mean that the interests of businesses and other stakeholders in the CBD should always prevail over those of developers, who may have a legitimate business interest in operating somewhere else. Moreover, such developers are not individually responsible for the adverse results of such urban decay, such as physical blight or a decreased sense of security among remaining residents and businesses. No individual legal fault should be attributed to such developers for second hand off-site effects. Yet here too, the zoning power could extend beyond harms that are otherwise actionable in private law to regulate adverse market externalities.

3 The Missing Link: Zoning as Regulation of Market Externalities

Having identified market externalities and their potential effects on land use, this Section underscores the normative justifications for employing the power of zoning to address potential market externalities. It focuses on the use of zoning to control the entry of commercial uses.

Any type of land use regulation that places practical limits on development may generate market externalities. In the housing context, several authors have argued that restrictive regulation is the key variable that explains increasing housing costs (Quigley & Raphael, 2005; Glaeser, Gyourko, & Saks, 2005). Such market effects in the residential context serve the interests of existing homeowners in high demand areas, incentivizing them to influence the political and regulatory process (Fischel, 2015).

Because of the large number and dispersed nature of existing homeowners, and even more so, of adversely affected end users (i.e., prospective buyers/renters), controversies about land use decisions that restrict development formally feature the developer, neighbors, and the local government as the disputants (Ellickson, Been, Hills, & Serkin, 2013). Local governments tend to rely in such cases on explicit considerations embedded in the control of technological or fiscal externalities, and judicial review determines the deference to such considerations.

Matters change, however, when the regulation implicates the entry of commercial uses. The developer will usually have a financial stake in the long-term profitability of the commercial use. For example—the retail revenues that a big-box store would generate over time. At the other end, while some residents or interest groups may object to the project due to environmental or fiscal externalities, current retailers or related businesses would seek to play an explicit role, given the potential market externalities that the development entails. Even if courts deny standing to

retailers made anxious by competition, such stakeholders may seek to employ at least one of two tactics: funding litigation for residents or groups with standing, or lobbying the government to protect their interests. In the latter case, if the government supports such interests, it would typically tie its reservations to general concerns over the economic viability of the relevant area or industry.

How should land use regulation draw the normative dividing line between anti-competitive behavior, tailored to promote the particular interests of an existing commercial user, and legitimate broad-based considerations of market externalities? Market externalities should be evaluated along the three dimensions presented above in Section 2.4: (a) welfare effects; (b) distributive concerns; (c) control of second-hand, off-site environmental/fiscal externalities. Additionally, the need to rely on a broad-based consideration in such matters entails both economic and legal considerations.

From an economic perspective, market externalities are inherently the manifestation of a change to a certain preexisting market-equilibrium (Laffont, 2008). This change implicates numerous parties on both the supply and demand sides. An understanding of the geographical scope and the kind of industries affected by the entry of a commercial development cannot rely solely on simple proxies, such as a fixed distance or estimated revenues per square foot. The calculation goes well beyond a zero sum game between existing and future retailers. Evaluating the effects of market externalities requires local governments to have a broader understanding of the commercial activity that takes place within its borders, and how positive or negative market externalities affect not only direct competitors, but also related businesses. As suggested above in Sect. 2.4, the entry of a competing commercial use such as a big-box retailer may have a very different effect on existing retailers than is the case with a nearby complementary business, such as a restaurant.

Moreover, from the point of view of aggregate welfare, I suggest that a regulatory analysis of market externalities—and the effect of a prospective development on the economic viability of preexisting commercial activities—requires the municipality to take a general stand on matters that are at the basis of agglomeration economics. For example, does the city place a special value on downtown business districts that feature a multitude of small and medium-scale retailers, or does it prefer retail economy concentrated at its perimeter?

The same dilemmas also touch on the two other dimensions of market externalities. A decision by a local government to prefer small and medium-scale businesses to large-scale retailers because of distributive considerations must consider the implications of a regulatory decision on other small businesses that are not direct competitors of the prospective large retailer, and which may be generally better off locating near such big businesses. If the city wishes to differentiate between various types of businesses in its distributive agenda—e.g., it seeks to preserve small fashion stores but it is less concerned about protecting mom-and-pop restaurants—it should not only offer a normatively valid reason for this differential treatment of small businesses, but also design its commercial zones to achieve such a result. The same requirement for a broad policy should apply to the control of second-hand environmental externalities or fiscal effects. If the city is determined to decrease the

prospects that its CBD will become rundown, it should have an explicit policy on what types of businesses are inherently essential for the economic viability of the CBD as a whole, or particularly prone to market externalities.

From a legal perspective, a broad-based policy regulating the entry of commercial uses, due to considerations of market externalities, is justified because existing private-law mechanisms (such as nuisance law) may fail to resolve certain types of externalities. As suggested in Sect. 2.1, the farther away one moves from land uses that may otherwise constitute a wrong in private law, the greater the burden on the local government to ground its restrictions in a broad-based policy. Of all externalities, market externalities are most often reciprocal—to use Coase's term—in identifying the normativity of the conduct. Therefore, to the extent that a land use regulation limits the entry of a commercial use because of market externalities, the regulation must show how such a decision promotes the *Village of Euclid* decision's concept of general welfare in the most genuine sense,[26] and why such a decision is not merely a pretext for preserving the status quo in the service of a politically powerful economic actor. Even within the "substantial relation" deferential standard, a legal limit based on market externalities must rely on a credible broad-based policy.

These insights may be instrumental in delineating the normative dividing line between legally inadequate protectionism and a legitimate control of market externalities, even if existing businesses may benefit from limits on entry of commercial uses in both cases.

Consider, on the one hand, the legal controversy over zoning limits placed on the entry of "formula businesses," typified by a "standardized array of services or merchandize, trademark, logo, service mark, symbol, decor, architecture, layout, uniform, or similar standardized feature."[27] This term seeks to capture major national retailers, such as Wal-Mart, McDonalds, or Starbucks.

Numerous municipalities in the United States have placed limits on such retailers, subjecting them to special permit procedures or economic impact reviews (Ellickson et al., 2013). The reasons provided for such limits are usually grounded in preserving an appropriate balance of small, medium, and large-scale businesses, or in controlling other effects that such retailers may have on the community. However, courts have scrutinized such regulations, especially when similar limits were not placed on other large businesses that do not have standardized features, meaning that the true motive for such limits is a targeted policy against specific retailers, not a general policy on the preservation of small businesses, or the viability of the CBD.[28] This targeted policy in the guise of a market externality analysis is especially prominent

[26] 272 U.S. 365 at 388.

[27] See Island Silver & Spice, Inc. v. Islamorada, 542 F.3d 844, 845 (11th Cir. 2008) (quoting the language of Ordinance 02-02 §§ 6.4.3-4(a-b), adopted in 2002 by the City of Islamorada, Florida).

[28] Island Silver & Spice, 542 F.3d at 847–49 (reasoning that the goal of preserving Islamorada's "small town" features does not stand if other large non-standardized retailers are allowed, and holding that the special limits on formula retail violate the Dormant Commerce Clause's protection of interstate commerce).

in the context of Wal-Mart, where labor unions seek to use municipal zoning regulations to prevent the entry of Wal-Mart stores (Epstein, 2007).

On the other hand, courts have been more deferential to zoning regulations that are grounded in a broad-based policy. In *Hernandez v. City of Hanford*, the California Supreme Court upheld a 2003 amendment to the city's zoning ordinance.[29] Aimed at protecting the "economic viability of Hanford's downtown commercial district," typified by a large number of "regionally well-regarded retail furniture stores," the original ordinance previously prohibited the sale of furniture in another commercial district, the PC district. The amendment created a special exception for large department stores—those with at least 50,000 sq. ft of floor space—located in the PC district, allowing them to sell furniture within a specifically described area of no more than 2500 sq. ft within the department store. In doing so, the amendment sought to add to the original goal of preserving the economic viability of the downtown commercial district, a new goal of attracting the "type of large department stores that the city views as essential to the economic viability of the PC district."[30]

The court viewed both goals as legitimate purposes, and validated the zoning measures taken to attain them. Surveying the history of the zoning ordinance and its amendments, the court noted that when the PC District was established in the late 1980s, a city committee identified types of commercial uses already established in the downtown district and which the city did not want moved to the PC district. These uses include car dealerships, banks, professional offices, and furniture stores.

The court concluded that the zoning power extended to the regulation of economic competition to advance a legitimate public goal. It held that a zoning ordinance is not necessarily invalid because it has the effect of limiting competition. Zoning actions, in which the "regulation of economic competition reasonably could be viewed as a direct and intended effect," would be valid as long as the primary purpose is a "valid *public* purpose such as furthering a municipality's general plan … for localized commercial development" rather than simply serving a business's private anticompetitive interests.[31]

Thus, for example, a city's decision to limit the entry of discount superstores and to organize its commercial development in existing neighborhood shopping centers would be legitimate, even if it has a "direct and intended effect of regulating competition." Such a zoning would be valid as long as it serves legitimate purposes such as maintaining the "vitality and economic viability of the city's neighborhood commercial centers," and thus avoiding an "urban/suburban decay" that might result from the shifting of commercial activity.

In this case, in working to preserve the downtown district, the City of Hanford identified in advance the types of commercial uses that serve as the economic anchors of district. Similarly, the local government identified department stores as the commercial anchor of the PC district, and ordered the types and scope of

[29] 159 P.3d 33 (Cal. 2007).

[30] Ibid. at 35, 39–40.

[31] Ibid. at 41–42.

commercial land uses within the district.[32] Therefore, the zoning ordinance did reflect a broad-based policy, not one merely tailored to protect private revenue streams of specific stores. For example, the Hanford zoning ordinance did nothing to limit the entry of new furniture stores in the downtown district or new department stores in the PC district. It did not limit the number of competitors, instead regulating their spatial distribution. The *Hernandez* case exemplifies how an explicit consideration of market externalities may be normatively legitimate when it relies on a broad-based policy.

4 Judicial Review of Market-Based Zoning

The previous Section laid the foundation for identifying market externalities resulting from land use, and explaining how zoning and other regulatory decisions could account for dimensions of aggregate welfare, distribution, and second-hand off-site technological or fiscal externalities embedded in market externalities. While there may be room for debate about the analysis of potential market externalities and the respective conclusions in contexts such as the entry of commercial uses, renting out of investment property, or inclusionary zoning, the control of market externalities should be explicitly recognized as a legitimate basis for zoning power.

At the same time, the need to tie the level of judicial review to the breadth and scope of the local land use policy plays a prominent role in the context of market externalities. The distinction between legislative or broad-based policy and ad hoc or adjudicative decision-making goes beyond considerations of rule of law, democratic accountability, and the need for occasional flexibility that regularly implicate land use law and policy (Fennell & Peñalver, 2014; Biber & Ruhl, 2014). I argue that the need to have a citywide, or at least an industry-wide, analysis prior to regulation touches on the very foundations of identifying the existence of a market externality and of normatively justifying the control over such potential effects through zoning rules.

From an economic perspective, a market externality is a process in which a certain market-equilibrium undergoes a change through the price system. This means that in most cases, a single development will not generate any type of market externality, but it might contribute to such a change in conjunction with other contemporaneous projects, resulting in a critical mass that creates a new equilibrium. When this is the case, identifying a market externality, or designing the adequate regulatory response (whether through a limit on land use, quota setting or a fee system), needs to be completed within a broader picture of the changing landscape of the city.

Indeed, there may be cases in which a single development could generate a market externality. This would be so especially in the case of a big-box retailer, such as a Wal-Mart Supercenter. Here too, however, a market analysis would require a broad

[32] Ibid. at 45–46.

analysis of the entire array of affected businesses, and more generally, of the policy choice between downtown business districts and spread-out retailers. An economic analysis based on agglomeration effects, or even on distributive concerns, would make little sense without a general policy on retail. These settings are therefore materially different from purely anticompetitive motives, such as when a single grocery store objects to a variance to set up a new grocery store on the other side of the street—with no discernible broader effects.

From a legal perspective, the generation of a market externality should be considered a blameless conduct, with no clear division between a wrongdoer and a victim. This is unlike some cases of environmental externalities, in which the normative basis of regulation lies in identifying a party who creates a conflict (even if such an action is not proscribed as a nuisance or another private law wrong), or of a fiscal externality, in which new public expenses must be incurred. As a matter of policy, individuals and firms should be encouraged to act in the market, promote competition and innovation, and otherwise stimulate the economy. There are cases in which considerations of agglomeration effects, distribution, or the possibility of second-hand externalities may justify the regulation of land uses intended for such an activity. However, these limits are not based on an initial normative judgment about the wrongful nature of the activity.

In contrast, no individual party can be viewed as legally entitled to block such an economic activity because this would infringe a legally recognized right or immunity from a change to the status-quo. A retailer has no vested right not to have competition around it, or to be compensated for such competition. A homeowner has no individual entitlement to prevent others from investing in real estate in his or her neighborhood. The justification for regulation lies in a general evaluation of the effects of a change to the market-equilibrium. As such, its legal validation must be based on a broad policy.

These observations do not preclude the possibility that in some cases, the regulation of a market externality must go beyond fixed formulas to provide a proper solution. The physical location of a big-box store, the type of products it is selling, and the composition of preexisting businesses may change across different scenarios, and would accordingly affect the identification of the market externality and the measures of control. This type of required flexibility should not be equated, however, with ad hoc decision-making, which attempts both to identify the problem and to cure it solely on a case-specific basis.

Conversely, in the case of technological, environmental or fiscal externalities, there could be cases in which an ad hoc analysis would be problematic, but at the least, it would be based on some initial normative baseline that identifies the cause of the externality and its anticipated consequences. The *Nollan/Dolan* framework, which requires localities that make ad hoc land use decisions to illustrate an "essential nexus" and "rough proportionality" between the development and its adverse consequences, inherently assumes that such an analysis of the cause and the cure can be made on an individual basis. In the case of a market externality, this assumption does not work. When a market externality is concerned, the "substantial relation" or "reasonable relationship" tests, while generally more lenient, may prove the only

feasible way for courts to address the legal validity of zoning mechanisms intended to address market externalities. Such a legal standard provides relief to the local government by releasing it from having to identify a market externality that can be attributed to a specific project. At the same time, this standard also places a burden of persuasion on the local government. The city must demonstrate that the zoning rationale conforms to its broad policy, and would be applied elsewhere in the city.

Finally, one should consider the role of zoning decisions, and the legal standard that should apply to their review, when such decisions seek to focus on the generation of positive market externalities, rather than merely on preventing or mitigating negative market externalities resulting from new development.

The discussion of positive market externalities requires an even more manifested differentiation between private law entitlements and the legitimacy of land use regulation than is the case with adverse market externalities. The law of restitution usually does not entitle a benefactor to require payment or another kind of compensation from beneficiaries-in-fact, including when a developer carries out a project that provides unsolicited positive externalities.[33] A neighbor cannot be held liable for a self-serving activity by another landowner that incidentally improves the neighbor's land, even when the monetary value of the benefit is easily measured.[34] This principle also applies when the benefit stems directly from a specific land use regulation, such as when a developer is required, as a condition for approving his or her subdivision map, to construct an additional road to ensure that a neighboring landlocked property gain access to the nearest thoroughfare.[35]

The reasons for private law's reluctance to require beneficiaries to contribute to the internalization of positive externalities lie in considerations of autonomy and preference for pre-activity agreements, especially if the activity is sufficiently profitable for its doer, so that the "free riding" by the beneficiary will not undermine it altogether (Dagan, 2004). Authors have also pointed to other dimensions of asymmetry between benefits and harms, including the nature of scope of the potential effects in the absence of private law rules (Porat, 2009).

Yet regardless of the arguments against restitution in the private law context, zoning and other types of land use regulation are entitled to take into account the positive externalities that a proposed project may entail, and should aim to maximize such social benefits in order to promote the local "general welfare."[36]

Consider the following hypothetical: A city wants to introduce more retail activity within its jurisdiction. For this purpose, the city considers rezoning one of two

[33] See Green Tree Estates v. Furstenberg, 124 N.W.2d 90 (Wis. 1963) (holding that a developer was not entitled to recover from a neighbor for voluntary construction of street improvement, curbs, and gutters).

[34] See Ulmer v. Farnsworth, 15 A. 65 (Me. 1888) (rejecting the plaintiffs' claim for recovery after their pumping of water from their own quarry unavoidably drained water from the defendant's quarry).

[35] See Dinosaur Dev., Inc. v. White, 265 Cal. Rptr. 525, 526 (Cal. Ct. App. 1989) (rejecting the restitution-based claim of a developer against his neighbor under such circumstances).

[36] Referring to the underlying rationale of promoting the "general welfare" through the zoning power, articulated in Village of Euclid, 272 U.S. 365 at 388.

agricultural or currently undeveloped areas located in different parts of the city for commercial use. After a careful study, it concludes that, all else being equal, rezoning Area A would generate more positive market externalities for adjacent businesses and households, as compared with Area B, because of geographic and other considerations. Assume further that the city concludes that rezoning both areas simultaneously would result in excess commercial development, which could end in a massive closing down of businesses. A decision to approve the rezoning of area A, based on the analysis of such positive market externalities, should be considered legally valid. This would be so even if such a decision stands to benefit the current landowners of Area A over those of Area B, provided that retail developers could purchase land in Area A.

The more difficult issue is how to balance positive market externalities with the developer's self-interests, if these two components are not perfectly aligned. The municipality may have to offer developer incentives to ensure optimal land use. Consider again the city's hypothetical case. Assume now that the same developer owns both Area A and Area B in their entirety. The developer would actually prefer to develop Area B, because it is geographically closer than Area A to the seaport through which the developer imports its retail products, meaning that the developer would save on transportation costs if Area B is developed. Assume further that the sum of the developer's savings on transportation costs in Area B is smaller than the difference in positive market externalities in favor of Area A. However, because the developer cannot internalize the positive market externalities it is generating (assume that such externalities are not reciprocal), it will prefer to rezone Area B over Area A. What the city could do in such a case, for example, is to offer the developer a density bonus for developing Area A.

This decision should be anchored in a broad policy, by which the city incentivizes developers that generate positive market externalities. If the societal costs, including environmental costs resulting from increased density, do not outweigh the overall benefits from rezoning Area A over Area B, such a zoning decision should be considered both economically sensible and legally valid. Localities should accordingly extend explicit considerations of market externalities to facilitate positive externalities, beyond controlling against negative ones. Such a move would further aid in unveiling market externalities as the missing link in the evolution of zoning.

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Part II
The Changing Landscape of Zoning

Rethinking Zoning for People: Utilizing the Concept of the Village

Kevin M. Leyden and Lorraine Fitzsimons D'Arcy

Abstract In this chapter, we propose it is time to re-think and re-imagine how we approach zoning. This is especially true for suburban developments. Today, especially in the United States, zoning in suburban areas is being used to segregate and separate the component parts of our communities into distinct zones which are spread out geographically and in most cases require the daily use of an automobile. The negative consequences of this form of development for health, community and the environment are discussed. Using a study of neighborhoods in Dublin, Ireland and its suburbs we examine how professionals and the public view the places they live and connect these perspectives to the manner in which zoning has changed over the course of the twentieth century. Insights from these professionals and the public lead us to propose that planners, engineers and developers be expected to think more about the kinds of walkable village neighborhoods that people seem to be drawn to almost instinctively. We urge that zoning laws be re-purposed to enable the building of communities that people prefer to live in.

1 Introduction

Zoning ordinances were originally well intended. In the name of health, access to light and clean air and water and to deter overcrowding, zoning laws attempted to bring regularity and promote liveability in cities. Urban residents and business wanted the peace of mind that went with knowing that certain uses such as horse livery stables, tanners, factories, and meatpacking facilities would be restricted near the places they worked or lived. Such zoning laws also addressed matters of density

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and the height of buildings so that various types of residential neighborhoods or districts could be planned.

Zoning laws, however, have been used to ill effect at times in certain cities and suburbs. In the United States, prior to World War I, zoning laws were often abused to segregate cities based upon race especially in more Southern cities (Schwieterman & Caspall, 2006). Later, Northern cities such as Chicago, Detroit, and Los Angeles and their suburbs permitted the use of racial deed restrictions or restrictive covenants which forbid the sale or lease of residential properties to African-Americans and sometimes other minorities (McKenzie, 1994; Schwieterman & Caspall, 2006). These restrictive covenants were struck down by the U.S. Supreme Court in 1948 and thus could no longer be used as a form of zoning.

But it is not the segregation of people by race or ethnicity that now plagues zoning. It is the segregation *of uses.* In many countries as diverse as the United States, Ireland, and Israel, for example, contemporary zoning codes narrowly restrict uses into distinctive zones, especially in suburbs and in newer parts of cities. Residential zones of various types are separated from retail zones which are again separated from green space zones or zones for schools. In most cases these zones are separated from each other at some distance and connected by roads creating a need to drive to each with a private vehicle. This type of zoning creates car-dependent suburban sprawl. Although there are important exceptions, most suburban municipalities today use zoning laws that encourage the building of places that are fundamentally different from the types of places that human beings have lived in since we first began to live in permanent settlements.

In this chapter, we propose there is a serious need to rethink zoning practices that emphasize narrowly defined zones based upon uses. We propose that planners should focus far more on placemaking, and the creation of walkable, mixed-use village or neighborhood designs. In planning new places, we need to first conceptualize the sort of places that enable community and are good for people and the environment. Our recommendations are informed by research conducted with both the public and various professionals involved in the planning of Dublin, Ireland and its suburbs.

2 Pedestrian-Oriented, Mixed-Use Designs vs. Suburban Sprawl: Zoning Makes the Difference

Whether planned or unplanned villages, towns and later cities were built on the assumption that residents would walk to attain their daily needs. Even when horses were used they typically moved at a walking pace. As a result, urban places were mixed-use. Residents could walk to markets and shops and places of worship and anywhere else they needed to go to meet their daily needs. By design, the places an urban resident needed to go were accessible on foot.

The planning of cities dates back to "at least 2600 BC" in "Mohenjo-Daro and Harappa in the Indus River Valley" (Brown et al., 2009, p. 28). Like the planning

that would eventually follow in the cities of Babylon, China, Egypt, Greece and Rome, the earliest planned cities tended to be comprised of short blocks of streets that typically followed grid-like patterns (some more winding, others more rectangular) most often surrounding a major market square which included important religious or governmental buildings (Brown et al., 2009).

When New York City adopted its first formal zoning ordinance in 1916, almost nothing about the way New York worked as a city changed. The basic concept of the city as a place that was largely pedestrian-oriented and mixed-use, built upon a grid system of short blocks and streets remained. New York City's public transportation system at the time (e.g., its growing subway system) weaved into this urban form naturally. New York's first zoning ordinance focused mostly upon issues of building height, lot coverages, and setbacks to enable access to light and air. Although specific zones for industrial uses were specified there was little debate by then that such uses should be separated into their own spaces. And by 1916 most Western cities had already recognized the need for regulations, services, and infrastructure to provide city residents with clean water, trash removal, clean streets, sewage and safer housing (Frumkin et al., 2004).

Zoning began to change, however, with the introduction of affordable mass-produced automobiles and housing, especially after World War II. The adoption of the car and housing built at a considerable distance from city centers was enabled in the United States by President Eisenhower's Interstate Highway system, which today "includes forty-six thousand miles of roads, built and maintained with tens of billions of federal and state spending" (Glaeser, 2011, p. 173). This coupled with urban crime, poor schools, and racial conflicts that came to a head mainly in cities in the 1960s and 1970s caused millions of Americans to leave cities and to seek what was perceived as a quieter more stable life in suburbs (Baxandall & Ewen, 2000). Suburban municipalities tended to see density as a problem to be avoided and zoned primarily for low-density development and assumed residents would use cars to move through their communities (Levine, 2010; Southworth & Ben-Joseph, 1995). From 1950 to 1970 the motor vehicle population in America grew "four times faster than the human one" (Kay, 1997, p. 265).

By the 1980s, especially in the United States, zoning codes in suburbs and in some new cities were creating and enabling a radically different settlement pattern than what had existed for centuries (Duany et al., 2000). The changes were additionally enabled by the legal acceptance of developer-led community or common-interest planning developments (McKenzie, 1994) that put further restrictions on what residents could do with their homes or properties. Suburban and later exurban places were zoned to separate uses into distinctive zones. Zones were thus created for types of residential, types of retail, office parks, areas zoned for schools or places of worship or zoned for parks, among others. Parking requirements were typically attached to every form of land use, meaning that most structures required a great deal of land space to be legal. Indeed, it was as though all the component parts of what used to be considered "the community" were now being zoned and separated geographically at distances that could only be easily traversed by an automobile. And because of a preference for low density housing, usually with big backyards, public transportation

became too inefficient to work without huge subsidies. The car became the only way to take part in one's community. Therefore, to shop, or go to a restaurant, or to worship or even to enjoy a walk (many suburbs lacked sidewalks) residents would have to own a car or get a lift from someone who did. Children too would be driven by parents to school, or to play or to visit other children. Owning a vehicle out of necessity also facilitated choices to shop outside one's immediate community further removing business and social opportunities away from where people lived. There are of course alternatives to this sort of suburban place, such as those being built and promoted by new urbanists (Duany et al., 2000; Duany & Talen, 2002; Haas, 2008), but in many jurisdictions notions of living in a walkable suburban village or neighborhood are not only rare, *they are not permitted by the zoning ordinance.*

Today this restrictive, low-density, spread-out, car-oriented development is called suburban sprawl. It is associated with car-dependency, single family homes on large land plots, shopping malls, large big-box chain stores, large collector schools, massive parking lots, gated communities of various sorts, long commutes and traffic. It is a different type of lifestyle – one enabled by a different interpretation of zoning – than the one experienced by those living in cities or towns, older pre-WWII suburbs, or even rural villages. And it is a lifestyle that has been encouraged by zoning regulations not only in the United States but in many suburban areas throughout the world.

There are benefits to suburban living which many people enjoy such as privacy, affordable large homes and good schools in many places (Glaeser, 2011). The vast bulk of empirical research, however, suggests a whole host of unintended consequences to building suburban sprawl and the kind of car-dependent suburban form it is based-upon. For example, researchers have found that car-dependent urban forms contribute to higher emissions of carbon and other forms of air pollution (Kahn, 2007; Glaeser, & Kahn, 2010; Ewing & Cervero, 2010). And because residents walk less higher levels of obesity are more likely and people are less likely to meet physical activity targets that are associated with good health (Frank and Engelke 2001; Lovasi et al., 2009; Frank et al., 2006, 2008; De Nazelle et al., 2011; Jackson et al. 2013; Giles-Corti et al., 2016; Lee et al., 2012; U.S. Department of Health and Human Services: Centers for Disease Control and Prevention: National Centre for Chronic Disease Prevention and Health Promotion, 1996; WHO Regional Office for Europe, 2006; Sallis et al., 1998). Others have found that car-dependent designs reduce social activity or social capital (Leyden, 2003), and increase the likelihood of social isolation, depression, and stress from commuting (Frumkin et al., 2004; WHO Regional Office for Europe, 2006; Warburton et al., 2006; Edwards & Tsouros, 2006; Morris & Hardman, 1997). Living in such places also increases the likelihood of death or serious injury from car crashes. There were 1.25 million road traffic deaths globally in 2013 (WHO, 2017); about 90 people die each day in the United States from motor vehicle crashes "resulting in the highest death rate among comparison countries" (Centers for Disease Control and Prevention 2017). There are other costs. The need to own at least one car to do almost anything outside the home can place a tremendous financial burden on families (Wickham, 2006). While it may not be a conscious response to these issues, there are places that have seen a price drop in the value of what were desirable suburban locations in

recent times and an increase in value of what were previously undesirable urban locations (Leinberger, 2012). Indeed, there is growing evidence suggesting when cities improve the quality of urban places they are quite capable of attracting residents across the lifespan and businesses of all types (Florida, 2005, 2010; Goldberg et al., 2012; Hogan et al. 2016; Gallagher, 2017).

As we noted in our introduction, and implied by the purpose of this book, we feel that 100 years is a good time to re-assess the future of zoning. We propose here that planners, engineers, developers and policy-makers need to offer a different land-use model that can compete with those currently on offer; zoning codes need to be reformed to enable a variety of different types of places to be built. Our thoughts about what these new offerings would look like was informed by the *Cleaner, Greener, Leaner Study*. This was a multi-disciplinary study funded by the Irish Environmental Protection Agency to investigate the influence of neighborhood walkability on residents' physical activity and transport behaviors in the Greater Dublin Area (Fitzsimons D'Arcy, 2013). Although not specifically focused upon zoning, the study's findings provide insight into the way people conceptualize the places they live in or visit. As we shall see below, our focus group and survey participants clearly perceived a fundamental conceptual difference between more walkable and car-dependent neighborhoods in and around Dublin; they also tended to speak more favorably toward more walkable places over car-dependent places when asked in our focus groups.

While the *Cleaner, Greener, Leaner Study* examined many aspects of neighborhood design and its effects we only focus upon one aspect of the study here: namely how do professionals and the public perceive the difference between more walkable neighborhoods and those that are more car-dependent? We focus upon this aspect of the larger study because we feel it provides important insights into the way zoning laws have affected the way our neighborhoods are perceived and how they function. The *Cleaner, Greener, Leaner Study* is unique too in that the study specifically asked both professionals and the public about how they perceive and behave in their neighborhoods.

3 Methods: Two Surveys and Focus Groups

The *Cleaner, Greener, Leaner Study* used a mixed methods approach. The study utilized a web-based survey of professionals, a comprehensive population survey of residents living in Dublin and its suburbs, and a series of in-depth focus groups of professionals. Each methods and key findings are discussed below.

3.1 The Web-based Survey of Professionals Involved with the Built Environment

The web-based survey focused upon professionals whose occupations were concerned with the built environment or examining its effects. Opinions of the following occupations – largely living or working in Dublin – were sought: public representatives, public servants from relevant government departments, engineers, transport and spatial planners, urban designers and landscape architects, architects, public health and physical activity promotion professionals, and representatives from relevant advocacy groups. All were familiar with pedestrian infrastructure, planning, streetscapes or walking promotion, yet they came from a range of various disciplines. A number of strategies were used to obtain a sample of these professionals including sign-up sheets at relevant conferences, a systematic identification of relevant government and local authority departments, public representatives, educational institutions, representative bodies and consultancies, to generate a list of individual emails. Recipients were also asked to forward the link to others from their networks who may be interested in completing the survey. It is acknowledged that there is a likely bias in our sample as only those with an interest in the topic were likely to complete the survey. Nonetheless, a diverse, relevant and experienced sample from various professional backgrounds was attained. In all, 219 professionals responded to the web-based survey. The breakdown of the sample is illustrated in Fig. 1. The typical respondent was about 40 years old.

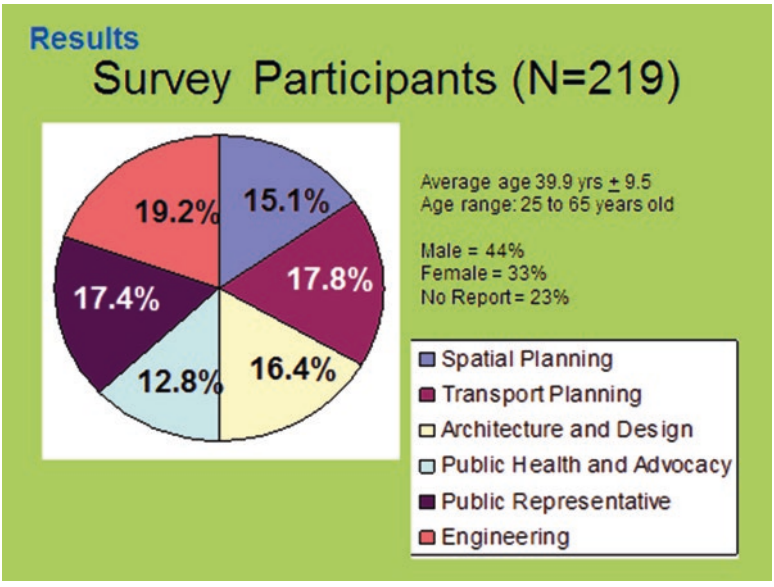

Fig. 1 The *Cleaner, Greener, Leaner Study* Web-based Survey of Professionals

Top 5 environmental features positively influencing the walkability of an area:
1. Well maintained footpaths (i.e., sidewalks)
2. Schools, shops, transport stops, recreation facilities and other services within walking distance to people's homes
3. Well-designed pedestrian crossings
4. Access to parks and other green spaces
5. Good street and footpath lighting

Top 5 environmental features negatively influencing the walkability of an area:
1. Above average crime rate
2. Wide roads with multiple lanes of traffic
3. Dirty unkept local area
4. Cul-de-Sacs
5. Long time waiting at pedestrian lights

Fig. 2 Environmental Features associated with Different Types of Neighborhoods (n = 219)

Among other questions, respondents were asked to rate the importance of 47 environmental attributes for neighborhood walkability. Each of these 47 attributes was scored from 1 to 5 with 1 being very good for walkability and 5 being very bad for walkability. The list was generated with the diversity of respondents in mind, making reference to a variety of neighborhood features. Fig. 2 lists the mean environmental items most likely to be viewed as very good for walkability and those thought to be the worst for the walkability of a neighborhood or local area.

The environmental items that professionals rated as very important for walkability had to do with mixed-used planning designs and a pedestrian orientation (Fig. 2). Highly walkable places were seen to require access to many destinations "within walking distance to people's homes" such as shops and green spaces and to require pedestrian infrastructure to facilitate walking such as good footpaths or sidewalks, and well-designed pedestrian crossings and lighting. Interestingly the kinds of places thought to be walkable by our professionals are not the kinds of places prioritized under current Irish zoning codes.

Items associated with being very bad for walkability appeared to address both car-oriented suburban sprawl and the dysfunctionality of some urban places. Places associated with cul-de-sac development, wide roads with multiple lanes of traffic, and long waits for pedestrians to cross streets were all seen as being bad for walkability. These attributes are very common in places typically zoned as suburban residential as they prioritize the car over the pedestrian and promote privacy. The results also implied that street engineering may shoulder part of the blame for the design of these unwalkable environments. Interestingly, places - urban or suburban - that had become dysfunctional due to higher levels of crime or the lack of proper maintenance were also perceived to be less walkable.

Most interesting from our perspective in this chapter is that the environmental design features associated with walkable vs non-walkable areas correspond to

differences in zoning priorities. In general, surveyed professionals tended to think of walkable areas as having more of a mixed-use pedestrian-oriented village feel whereas attributes thought to discourage walkability tended to be those that dominate car-dependent zoning plans. As we shall see in the next section below, the public tended to hold similar views.

3.2 The Population Survey of People Living in Dublin and Its Suburbs

In addition to a web-based survey of professions *The Cleaner, Greener, Leaner Study* also included a comprehensive household population survey of 1064 people living in Dublin City or its suburbs. The survey was carried out from July to September 2011. With the aid of professionals who participated in the study's focus groups (see below), 16 neighborhoods or local areas were selected. From these 16 neighborhoods one adult from a total of 1064 households were interviewed. The 16 neighborhoods were identified as being either high or low in terms of walkability. The study also sought to include some neighborhoods that were categorized as being economically deprived based upon census data.

The goal was to attain respondents from a healthy mix of neighborhood types. The high walkable neighborhoods which were not deprived were historic urban communities or villages which became part of the city over time as it expanded out from its core. Two were close to the city center and two were coastal villages with good rail links to the city center. The high walkable areas which were categorized as deprived were well-known established urban neighborhoods close to the city center which had a relatively high concentration of social housing for poorer households. It was observed at the time our survey was conducted that many of these areas had started to undergo recent gentrification.

All of the low walkable neighborhood areas were suburban and car-oriented. Chosen areas that were not economically deprived were new developer-built suburban housing estates (or subdivisions), constructed in the last two decades outside the city orbital motorway. These areas are typical of the suburban sprawl which we argue is the product of a modern interpretation of zoning. The more economically deprived areas (that were also categorized as low in walkability) were local authority built social housing estates for lower income households. One of these suburban estates (or subdivisions) was completed in the 1940s and the others were built in the 1970s to re-home residents of higher density city slums. Both of these low walkable area categories could be classified as sprawling housing estates with no definable core. While all of these suburban places were car-oriented, the economically deprived areas had some local services and public transport access possibly due to their age. The new suburban developments, however, had very little public transport or local services. In general housing tended to be built within cul-de-sacs where residents were expected to drive to attain almost all their daily needs.

1. A variety of shops/ homes/ businesses and amenities
2. Many inviting locally owned shops
3. People about all day and in the evening shopping or visiting restaurants and pubs nearby
4. A mix of age groups, young and old people, as well as a mix of family types
5. I can do most of my shopping in local shops
6. Is an unique area with personality and character
7. Nice places within walking distance of my home, to go for a walk for recreation (such as a park or even just around the neighborhood itself)

Fig. 3 Public Opinion and the Village Construct

The population survey asked respondents a long list of questions related to their neighborhoods as well as health and travel behavior questions among others. For our purposes here, however, we focus upon just one battery of questions. Neighborhood residents were asked for their level of agreement with a series of 41 statements relating to their neighborhoods. The statements were largely similar to those in the initial professional's survey but in this case residents were asked to what degree each of these 41 attributes described the place where they lived.

A factor (component) analysis of the residents' responses to these statements reduced the statements into six sub-component groupings encompassing 38 of the statements (see Fitzsimons D'Arcy, 2013). Here we focus upon the first two components which were the most distinctive. The first component we labelled 'crime and disorder.' Further analysis showed that this component was associated with the deprivation status of the area groupings where residents were concerned about crime and the relative untidiness or run-down nature of the places they lived in. The second component we labelled 'the village' and consisted of the items listed in Fig. 3.

This second construct was more likely to be expressed by people living in walkable neighborhoods, especially areas that were better off economically. Similar to the opinions of professionals working with the built environment, the public saw walkable areas as being clearly distinctive with a "unique personality or character." As Fig. 3 suggests, residents of more walkable areas tended to see their neighborhoods as having a variety of locally owned shops, restaurants, pubs and recreational amenities "within walking distance." They also tended to believe the places they lived had a mix of age groups and family types.

3.3 Focus Groups of Professionals Involved with the Built Environment: How Professional Participants Discussed Car-dependent vs. Walkable Areas

Our web-based survey of professionals described above was also used to invite professionals and policy-makers to participate in a series of focus groups in the summer of 2010. Twenty-six individuals took part in five focus groups, 12% of the original web-based study sample with the same gender and age profiles as the larger group. Eight

(31%) of the group were from architecture, landscape architecture and urban design, six (23%) from spatial planning, six (23%) from transport planning and engineering, four (15%) from public health or advocacy groups and two were public representatives (8%).

At the beginning of each focus group, a map of the Greater Dublin Area (the city and its suburbs) was given to each participant from which they were asked to select areas of high and low walkability that were familiar to them. Open discussion followed. This format allowed for cross-comparison between groups as each discussion session had its own dynamic and direction, but usefully had a common external reference point (locations on the map). Focus groups were repeated until no new topics in relation to what makes an area walkable or not were being raised in the focus groups.

With respect to zoning, some of the most informative and insightful information was obtained from the focus group participants' narratives when describing the areas they identified as high and low walkable. While the reasons for selecting high and low walkable areas varied based on an individual's views there was little disagreement on the areas selected. Similar to the findings of the web-based survey of professionals (of which our focus groups came) and the population survey, the focus group participants tended to discuss walkable areas as being very different from car-oriented places. Again, this is important because these distinguishing differences have a great deal to do with the differences between traditional urban designs and modern zoning practices which separate uses.

So how did our focus groups participants think about neighborhoods? Interestingly, and similarly to the professional and public surveys, our focus group participants tended to think most positively about places they thought resembled walkable villages and less favorably toward modern car-dependent designs.

All of the focus groups participants agreed that highly walkable areas of Dublin tended to be centered around a village core or square or were within close proximity to the city center with small local service nodes. They also tended to suggest that such places enabled residents to attain their daily needs on foot locally. These self-contained '*liveable*' areas were seen as places where you can '*spend your weekend quite easily without going into town*' [Architect] or places where '*everything is within walking distance that you could possibly need over the course of a week*' [Landscape Architect]. A key characteristic of these liveable villages or neighborhoods was that they were '*built when people walked*' [Transport Planner] which resulted in facilities and destinations being spaced at distances which could be walked [to]: *'Houses, shops, the church, and the pub, they are all close together. And there are a lot of houses close together. So the majority of people are able to walk everywhere… (it has) a nice villagey sort of feel to it*' [Architect] and *'Parks spaced at distances that you would comfortably walk to*' [Transport Planner].

Many of the focus group participants felt these desirable village-like places could exist in the city, suburb or a rural area. Within the city these urban village places were said to have their own character due to their grain, street layout, and scale and thus had a very different feel from the higher density big block city center areas. '*I suppose* [the best places are like a] *little village in the city in the heart of it all; you've a little … self-sufficient village, so close to the center of the city and yet suddenly when you're in that village you sort of feel removed from the city*' [Engineer]. An interesting comparison was drawn between Dalkey, a suburban coastal village just outside of

Dublin City, and certain neighborhoods of New York City where, despite the substantially higher density differences both were discussed as being village-like and thus desirable place to live in or visit. 'W*hen you're in New York City, you generally live in a little sort of commune, shall we call it – in the West Village, the East Village, Soho, and other nicer parts, but it's the fact that you have that close knit village in its own big city context with everything else that matters…, you still have the sea and you have nice little shops and everything is in pretty good nick so* [even in New York City] *it's… the fact that you have a little village, within I suppose, a bigger environment* [that makes these places great places to live or visit]' [Engineer].

In comparing and contrasting walkable areas of Dublin and its suburbs with those that were perceived as car-oriented, participants overwhelming imagined walkable places as better places to live in or visit. Indeed, there appeared to be something about walkability itself that seemed to matter to them. Walkable neighborhoods were characterized as places planned or designed to facilitate walking to carry out daily needs and as places where residents could walk for recreation or leisure. '*I suppose what I would pick as high walkable are areas … that can manage to combine both … walking to the shops [and enabling] pleasant places* [where residents can] *go for a stroll'* [Public Health/Advocacy]. One participant attempted to summarize his focus group's thinking about walkable areas by remarking: '*All the places that people here are saying are walkable it's* [because they have] *that village atmosphere. It's the sense of vibrancy and destination and something that you can actually go and do … you can go for lunch and walk around. … and maybe head off to the seaside or up* [a nearby] *hill'* [Urban Designer].

In addition to the notion of a village core where people could walk to attain their daily needs or to be social, focus group participants tended to also feel the best walkable places were "real places" or "unique destinations." This notion relates to the urban design concept of imageability which describes the quality of a place that makes it distinct, recognizable, and memorable (Lynch, 1965). Areas selected as high walkable were thought to be easily identified by many participants. In contrast, low walkable areas tended to be described with more difficulty without a particular identifiable place or landmark. One such area was described as: *'…one of those areas that has experienced a huge amount of development in the 80s and in the 90s and* [is]*, incoherent* [as a place]. *It is just a lot of housing … with no significant facilities or character'* [Spatial Planner].

It is worth noting that the professionals we interviewed as part of our web-survey and focus groups did not think that high density made places more liveable or more walkable. This is interesting because issues of density are commonly thought to be important in both transportation planning practice and walkability research (Saelens et al., 2003; Brownson et al., 2009; Ewing and Cervero, 2010). Unprompted, density was only mentioned twice in the focus groups. We suspect that while density may be important to make pedestrian-oriented, mixed-use places possible, density for density sake was not necessarily thought as critically important by our focus group participants. Instead participants frequently mentioned the scale of the built environment or the degree of its compactness - which Jan Gehl (2010, p. 65) refers to as 'the right kind of density.'

While density was not a priority, human scale and permeability were mentioned as being important. Human scale refers to an environment scale which is perceptually comfortable for human beings in size and distance (Ewing et al., 2006; Gehl, 2010). This relative size or scale of an environment can affect feelings of comfort, belonging, isolation and vulnerability. Permeability is a measure of the ease of movement through an area. A neighborhood may have a well-connected street network but be perceived as impermeable for a variety of reasons such as the expectation that pedestrians cross wide, heavily trafficked roads or walk through dark, unkempt areas.

Scale and associated terminology was present in the vocabulary of urban designers, architects, landscape architects, planners and some of the other participants. Scale was clearly thought to affect how comfortable people felt in different types of places; comments such as '*there is a lovely scale … the area really has nice sense of enclosure'* [Urban Designer] were fairly common. Others described their emotional response to relative size or distance: *'you have a vast expanse of land in front of you … it is very daunting'* [Landscape Architect]. Those who did not use specific urban design terminology used emotional responses to convey their general comfort with places that were designed to human scale and discomfort with car-centric environments.

Car-oriented areas were typically described as *lacking* human scale and permeability. One participant labelled car-dependent areas as having their own type of urban form she called *'Carchitecture'* [Landscape Architect]. To this participant "carchitecture scale" describes wide roads, large box buildings, long distances between services and isolated cul-de-sac suburban housing estates where the '*presumption is that this is an area where homes have 2 to 3 cars*' [Spatial Planner]. The wide-roads and associated large big-box developments common in these suburban places were described as being so '*enormous in scale, I feel I should be in a car'* [Landscape Architect]. Similarly, large green spaces within low density housing estates (or suburban subdivisions) were also perceived as negative by participants despite the fact that access to green space is frequently mentioned as being desirable for health and wellbeing (Van den Berg et al. 2010). This is because many of the green spaces in Dublin's suburbs are not planned by landscape architects but by developers who fail to make them inviting places. Indeed, zoning for green space without providing the professional support needed to make these spaces that people want to be in can lead to the creation of some unwelcoming places. Sometimes the descriptions of these poorly designed and badly maintained green spaces were depressive: [The green space there] *'is very bleak and a lot of very open space which on the one hand makes it very permeable but at the same time makes you feel isolated'* [Landscape Architect].

Participants also frequently mentioned the 'expansive' scale of the suburban road network. In all of the focus groups, blame for the negative impact of roads on walkability was attributed to transport professionals and their use of highway design standards which prioritize the movement of vehicles over people. '*They design roads to move cars quickly; they perceive* [these roads] *to be safer because there have less junctions, and there is no frontage, there are no driveways, and there is little pedestrian activity so the things that could potentially create a conflict are designed out*' [Urban Designer].

Many participants also expressed concerns about the way suburban zoning regulations promoted shopping centers which were built '*completely segregated from the existing town centers'* [Landscape Architect]. The difficulty in getting to them on foot or by public transport was highlighted as problematic for walkability. As one participant put it: '*most of where we are expected to shop is built around huge car parks, surrounding giant retail centers separated by wide roads and more carparks.* [Even if you wanted to walk to or between these retail centers it] *would require an awful lot of walking and it wouldn't be safe*' [Spatial Planner]. While getting to these car-oriented shopping centers was perceived as hostile to those who wanted to arrive without a private vehicle the internal environments were described as very comfortable for walking around in. Ironically some of these malls or shopping centers were designed internally to replicate village streetscapes.

4 Discussion and Conclusions

This chapter makes the case that it is time to re-evaluate the way we use zoning to plan the places we live in. In large part because of the introduction of the automobile and highways, the way we use zoning to plan our communities changed during the last half of the twentieth century. Today, especially in the United States, zoning in suburban areas is being used to segregate and separate the component parts of our communities into distinct zones that are in many places only accessible if one owns and can operate a private automobile. As noted above there are growing concerns that this style of zoning is having a profoundly negative impact on our health, our sense of community and our planet.

In this chapter, we have also attempted to share some of the findings of the Dublin-based *Cleaner, Greener, Leaner Study*. On many levels, this study supports the notion that there are indeed different types of neighborhoods - both urban and suburban - and that the way these different types of places are zoned and planned affects how people feel and behave. Both professionals and the public clearly realize that there is a difference between modern car-dependent places and more traditional mixed-use pedestrian oriented places. And they clearly feel more positively toward the more traditional designs even though modern zoning ordinances are *biased agains*t building this traditional form of development.

Most interesting of all is that we found that when asked professionals and the public tended to have an almost innate bias in favor of places that reminded them of a village. In their mind's eye, these are distinct places where residents can easily walk to attain their daily needs or be social or to go for a pleasant walk. Perhaps this is an Irish phenomenon; we are not sure.

Still, there is something deeply appealing and human about the village concept. *Therefore, we would like to propose that going forward, zoning practices be reconstructed and re-imagined to make the idea of the village a fundamental building block when planning and building the places we live.*

What we are saying is incredibly simple. We feel that planners, and engineers and developers must be taught and expected to build villages again. These villages can be in urban places, suburban places and rural places. Some will include high-rise buildings, or modern architecture and others might make some accommodation for the automobile. But the key is that these places should be first and foremost about building more walkable places that enable community connections and break the dependency on the automobile. *In too many places current zoning practices require planners, engineers and developers to think first about cars and how to move them and park them; they are also expected to think first and foremost about separating uses.* We are asking for a very different starting point. We are asking for one that first asks to consider people, and their connections with each other, and their connections with the communities they live in.

Our call to think more about, and to plan more around, the village concept is only unique in its simplicity. There is already an important and sophisticated movement or researchers and practitioners who are currently advocating that we plan and build more people oriented, liveable or sustainable communities again (Frank and Engelke, 2001; King et al., 2002; Sallis et al., 2009). This movement has many strands that include new urbanism (Duany et al., 2000; Duany & Talen, 2002), Jan Gehl's call to build *Cities for People* (2010), models that advocate the building of Transit-Oriented Development (Bernick & Cervero, 1997; Cervero, 1998, 2004; Ewing et al., 2013) and discussions about the key ingredients to building more human places usually involving a focus upon density, diversity (of land-use mix), design, destination accessibility and distance to transport (Cervero, 1998; Ewing & Cervero, 2010; Giles-Corti et al., 2016). Others have focused more on placemaking (e.g., Walters, 2007; Brown et al., 2009) retrofitting car-oriented suburban into more liveable places (Dunham-Jones and Williamson, 2008); health (Saelens et al., 2003); happiness (Leyden et al., 2011; Montgomery, 2013; and Pfeiffer and Cloutier, 2016); or sustainability. In Ireland, change is beginning to happen in that exceptions to current suburban zoning laws can now be sought; as a result several Transit-Oriented villages are being completed or proposed. The national government is also beginning to promote improved mixed-use street designs that hold great promise. The recent introduction of mandatory guidelines in the Design Manual for Urban Roads and Streets (Department for Transport Tourism and Sport [DTTAS] and Department for Environment Community and Local Government [DECLG], 2013) with multi-disciplinary inputs based on the UK's Manual for Streets (Department for Transport UK, 2007) has facilitated this.

Early in the *Cleaner, Leaner, Greener Study* it became apparent that many design considerations and concepts can get lost in translation among multidisciplinary teams. This became especially evident in the focus groups when participants who were not from the design professions started to turn to designers to verbalize what they were trying to describe. Similarly, mistranslations can happen when practitioners try to apply academic research, or when academics propose ideas that do not have the grounded knowledge that comes from real world design practice. Design and research teams need words and concepts that people can easily identify with across disciplines and professions; complicated academic language can often miss the mark. We feel that asking those who are expected to plan and build our communi-

ties to think and plan around the concept of the village may provide a useful starting point for many. It is certainly a better starting point than assuming that new suburban areas should be built around the automobile, wide roads, and shopping malls.

We sincerely hope that going forward zoning practices take heed of the important insights advocates for more vibrant communities envision. And we hope that once again people have more opportunities to live in the kinds of environments that enable human beings to flourish.

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Community Benefits Agreements: Flexibility and Inclusion in U.S. Zoning

Gerald Korngold

Abstract Community benefits agreements (CBAs) have been recently introduced as adjuncts into the traditional U.S. zoning process. These agreements are executed by developers of major real estate projects and community groups representing the neighborhood where the development is to be built. Government often collaborates in CBAs to varying degrees, including participating in the CBA negotiations, or executing the document. CBA provisions usually bind developers in two ways: (1) CBAs impose requirements similar to those of typical land use regulation, focusing on reducing physical negative externalities of the project; (2) CBAs institute community development obligations, including providing jobs and support for community building. Community groups value CBAs because they give greater and more direct control over their neighborhoods and address community enhancement issues not covered by zoning. Many developers believe that neighborhood support through a CBA will help gain any needed governmental approvals. Public policy is served because CBAs bring inclusiveness and transparency to the land regulation process, even though there may be a loss in public planning on a municipal-wide basis.

1 Community Benefits Agreements

Traditionally, the zoning process in the United States involved only the government decision-maker imposing the regulatory restrictions, and the burdened landowner. Moreover, the subject matter regulated by zoning was typically limited to physical aspects of the property, such as type of use, building size and height, and density.

Beginning in the late twentieth century, community benefits agreements (CBAs) were introduced into the zoning process. CBAs affect traditional zoning in two important ways. First, they give the members of the surrounding community a place at the table with developers of major projects as part of the official or unofficial zoning approval process. Second, CBAs expand the issues under consideration as part of land use regulation approval to include community investment by the developer.

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1.1 Defining a Community Benefits Agreement

A CBA is an agreement between the developer of a new real estate project, and a community organization or a coalition of groups representing the interests of those who will be impacted by development. Neighborhood associations, faith-based groups, unions, and environmental organizations might execute such agreements with developers, as community representatives (Marantz, 2015; Tulane Law School Public Law Center, 2011; Wolf-Powers, 2010). In some cases, the municipality or other governmental units may join as an additional party in the agreement or incorporate the CBA into a development agreement between the city and the developer. While CBAs are private contracts, they are often negotiated to gain an advantage for the developer concerning two governmental actions. First, developers might seek community support via a CBA to lay a foundation for, and prevent opposition to, necessary governmental zoning or other land use approval for the project; second, a developer might use a CBA to acquire and demonstrate community buy-in as part of the developer's application for a public subsidy or financing for the project (Marcello, 2007).

CBAs have been included in a variety of projects: airport modernization, industrial, sports complexes, hospital expansions, mixed use developments, housing construction, "new town" developments, hotel projects, full-scale urban renewal schemes, among others (Janis, 2007).

1.2 Data

There does not appear to be a recent nor comprehensive census of the number of CBA-based projects in the United States. There are various complications in finding an exact number: as private agreements, they typically do not have to be disclosed. Moreover, the term "community benefits agreement" is used differently by various sources. For example, the expansion at the Los Angeles Airport (LAX) is often referred to as involving a CBA even though the developer was a public agency, not a private entity,[1] and the Yankee Stadium agreement is not considered to be a true CBA by some because there was no formal community participation (Marantz, 2015).

A 2011 inventory lists 18 CBAs across the United States, with five more voided due to financial trouble (Tulane Law School Public Law Center, 2011), a 2006 survey had the number at "nearly 40" (Janis, 2007, p. 17), and a 2008 study provided a comprehensive review of 22 CBAs (Salkin & Lavine, 2008). There are overlaps among these data points. Major CBAs have been reported in the

[1] Partnership for Working Families (2016) describes the parties to the LAX CBA as not including a private developer.

Knightbridge section of the Bronx, New York, in 2013 and Milwaukee, Wisconsin, in 2016 (DeBarbieri, 2016; Kaiser, 2016).

1.3 Sample CBA Goals and Provisions

A CBA might require the developer to take two general types of measures. First, there are measures that are similar to those that might be required by a municipality under its zoning or other land use regulations to mitigate physical, environmental, or other planning-related harms caused by the development of the surrounding area. Second, the CBA might require the developer to also offer financial contributions, employment, and services that go beyond traditional planning and zoning concerns. This second group is designed to enhance the economic development and welfare of the neighborhood, and to provide economic opportunity for the nearby residents, with the greatest focus typically on job creation and providing living wages.

A Pioneering CBA

These two features—reduction of negative externalities and economic development—are illustrated in the CBA in connection with the 2001 expansion of the Staples Center sports arena in Los Angeles into a broader entertainment, office, and residential center. When the original Staples Center was opened in Los Angeles in 1999, the residents of the neighboring community were subjected to increased crime, congestion, and reckless automobile driving, posing additional threats to a neighborhood and children who already lacked sufficient public parks (Marcello, 2007). As a result, when developers sought a $1 billion expansion of the Center, adding a hotel, arenas, shops, and apartments, organizers associated with community groups and labor unions sought to ensure that the project would also benefit local residents and negative externalities would be limited (Marantz, 2015). The coalition that joined together included 29 organizations, two labor unions, and some 300 individuals living close by.

Ultimately the developer and the coalition executed what is generally acknowledged as the first full-fledged CBA in the United States (Janis, 2007; McKean, 2015). The CBA contained developer obligations analogous to exactions often imposed as part of governmental land use approvals, such as contributions to affordable housing projects, parks, and recreational facilities, and financing for a reserved street parking program for residents who otherwise would be displaced by Staples Center patrons. It also required community development promises, such as targeted hiring and wage goals, community consultation on commercial tenants, and developer funding for a nonprofit organization to oversee the hiring program and to provide annual reports on the project (Gross et al., 2005; Marantz, 2015).

CBA Elements

While there are variations among different CBAs, commentators have described certain features that are somewhat common (Camacho, 2013; DeBarbieri, 2016; Gross et al., 2005; Laing, 2009; Marantz, 2015; Musil, 2012; Parks & Warren, 2009; Salkin & Lavine, 2009; Severin, 2013; Wolf-Powers, 2010).[2] These might include aspects similar to traditional zoning approval requirements and attributes that are more related to community development. Features of CBAs that are parallel to zoning requirements include:

- Smart growth principles concerning density, proximity to services and transportation.
- Green space, recreation facilities, and parks.
- Reducing traffic and parking congestion, perhaps through requirements to construct off-street parking.
- Environmental cleanup of polluted sites.
- Green building standards.

A major feature, of CBAs, however, is that they allow the community to bargain with the developer to obtain concessions on substantive matters not usually covered by zoning or other usual land use regulations. Thus, CBAs have bound developers on employment, economic development, community building, and specialized environmental issues:

- Employment (a centerpiece in most CBAs):
  - Construction jobs and training.
  - Local hiring preferences for permanent jobs at the development, with preferences perhaps for at-risk youth, women going off welfare, homeless people, and people with disabilities.
  - Living wage requirements.
- Economic Development:
  - Responsible contractor requirements to bar those with poor records with compliance and regulation.
  - Community involvement in the selection of permanent tenants or requiring or prohibiting certain types of businesses (e.g., designating space for a needed local bank or general supermarket with fresh foods and barring certain tenants felt to be detrimental to the community, such as payday lenders and pawnshops).
  - Support for local businesses—whether or not the jurisdiction has relevant public regulation, CBAs often set goals for developers, including awarding contracts to minority and women owned businesses, setting space aside for small local businesses in retail projects, and limiting big box stores.

[2] Janis (2007, pp. 17–18) provides the most comprehensive list.

- Community Building:
  - Affordable housing (rental and ownership), perhaps including preferences for people displaced by the construction, and often exceeding any governmental requirements.
  - Setting aside space or contributing to child care centers, public health clinics, and other community facilities.
  - Funding for community services and organizations.
  - Accessibility.
  - Occasionally, input into building design and aesthetics, as part of a community's "placemaking."
  - Community space leased rent-free to the community coalition, with the uses to be determined by the coalition.
- Environmental:
  - Limiting the environmental impacts of the construction process.
  - Mitigating environmental impacts for projects that create long-term issues, reflecting environmental justice concerns.

2 Policy and Business Reasons Supporting Community Benefits Agreements

Parties to CBAs and local political leaders draw certain advantages from these arrangements. Moreover, the use of CBAs serves other broader civic policies. This section discusses those individual advantages and public gains, while also cautioning against potential costs of CBAs.

2.1 Advantages of CBAs to the Direct Parties and Local Political Leaders

Traditional Explanations for the Developer's Willingness to Enter CBAs

Various commentators have suggested that developers enter into CBAs for a variety of reasons. First, developers hope that a CBA will help with any required governmental approval of projects. They believe that a CBA will reduce community opposition to the development, thus decreasing pressure on political actors and increasing the chances that governmental entities will grant necessary approvals (Nadler, 2010; New York City Bar, 2010). Developers may seek to avoid community members' use of public hearings as more than a chance to give officials feedback, but rather as organizing vehicles and "political pressure points" (Parks & Warren, 2009, p. 97). Moreover, to the extent the project is seeking government financing, a CBA may

help to secure community support necessary for government investment (New York City Bar, 2010).

The predicable cost of the CBA is preferable to the developer over the uncertainty of the costs and delay of litigation to obtain approval in the face of community opposition (McKean, 2015). A former chief of the law department for New York City referred to the signing of a CBA as "a form of mediation before litigation even begins" (Cardozo, 2007, p. 803). The prevention of delay is essential to developers as they seek to hold their financing and construction team in place in a changing business environment.

Some developers may believe that negotiating initially on enforcement issues with a community group may yield less onerous terms than negotiations with public officials for community benefits as part of land use approval (New York City Bar, 2010). Additionally, they may feel that the additional initial costs of the CBA can be passed along to the project's end users, resulting in no actual cost to the developer (Nadler, 2010).

Traditional Explanations for Communities' Interest in CBAs

Community members might seek a CBA for numerous reasons. First, there is the aspiration of increased community participation in development decisions. Proponents maintain that the CBA method gives the community greater and more direct voice in the project approval (Baxamusa, 2008; Camacho, 2013). They argue that traditional political processes and land use approval procedures do not deliver what the community most desires from the development. Political actors, moreover, can be subject to pressures that the community feels are not in its best interest.

Moreover, there are issues beyond land use controls. CBAs allow the community to address issues that government does not require under typical land use regulation, such as construction and post-construction employment goals, living-wage levels, contributions to local non-profits, access by community residents to facilities, among others (New York City Bar, 2010). CBAs may allow the community to acquire infrastructure and services (resources) that are not usually forthcoming from municipal government. Finally, some community organizers view the CBA process as a valuable experience of the community coming together and building capacity that can be leveraged to address opportunities and challenges (Camacho, 2013).

CBA Benefits to Public Officials

It has been asserted that elected officials benefit indirectly when their constituents gain through a CBA—what is good for constituents is good for their representatives (Nadler, 2010). This often comes at little cost to the official: the citizens get a positive outcome without the politician expending the effort, or capital, required to capture public resources through the political process. CBAs may also allow the

community to receive benefits, such as jobs, that the official could not otherwise deliver (New York City Bar, 2010).

CBAs often expedite the approval of new projects, thus serving the desire of officials to bring increased economic development, tax revenues, and employment (Saito, 2012). Moreover, by involving the community, elected officials can protect themselves from subsequent citizen complaints about the development if it proves unpopular (Nadler, 2010).

2.2 Broader Policy Benefits of CBAs

In addition to the gains that CBAs bring to the parties involved in the process, these agreements may also have larger policy advantages. CBAs may provide flexibility beyond traditional zoning, greater community inclusiveness, and transparency.

Flexibility

Substance of Zoning. Typically, zoning controls a constrained number of *substantive* areas: the use of the land (whether residential, commercial, or industrial), density requirements (by controlling minimum lot sizes, number of dwelling units and occupants), and site development regulations (setback and building height requirements and limits on the percentage of a lot that can be occupied) (Mandelker, 2003, p. 5–3). Sophisticated codes might reduce externalities by requiring off-street parking and provide density bonuses if the developer provides public amenities such as open space or pocket parks (Mandelker, 2003, p. 5–72).

Generally, American zoning does not address the issue of affordable housing. Only a limited number of American municipalities have legislative requirement for inclusionary zoning for affordable housing, either by way of mandatory percentages of affordable housing in proposed developments, or by providing zoning incentives to developers to build such units as part of their market-rate projects (Mandelker, 2003, p. 7–30). Only a few court decisions have imposed inclusionary housing requirements on communities, notably in the New Jersey *Mount Laurel* decision.[3]

Indeed, zoning is often the legal device that prevents inclusionary zoning and blocks affordable housing (Dougherty, 2016; Lens & Monkkonen, 2016). Large lot zoning—which requires significant lot size per residence—essentially bars the building of affordable homes because of prohibitive land acquisition and construction costs. Only a few states have controlled such zoning (Mandelker, 2003, p. 5–34).[4] Jason Furman, Chairman of the Council of Economic Advisers under

[3] Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.22 713 (N.J.), *app. dismissed and cert. denied*, 423 U.S. 808 (1975).

[4] Upholding large lot zoning: Jaylin Investments, Inc. v. Village of Moreland Hills, 107 Ohio St. 3d 339 (2006); Manzo v. Township of Marlboro, 838 A.2d 534, *aff'd*, 838 A.2d 463 (N.J. App. Div.

President Obama, warned against the negative effects of zoning on housing affordability:

> There can be compelling environmental reasons in some localities to limit high-density or multi-use development. Similarly, health and safety concerns – such as an area's air traffic patterns, viability of its water supply, or its geologic stability – may merit height and lot size restrictions. But in other cases, zoning regulations and other local barriers to housing development allow a small number of individuals to capture the economic benefits of living in a community, thus limiting diversity and mobility. The artificial upward pressure that zoning places on house prices – primarily by functioning as a supply constraint – also may undermine the market forces that would otherwise determine how much housing to build, where to build, and what type to build, leading to a mismatch between the types of housing that households want, what they can afford, and what is available to buy or rent. (Furman, 2015, p. 2).

CBAs, therefore, can serve the civic interest by allowing communities greater substantive flexibility beyond the zoning code when dealing with developers. Communities can employ CBAs to require both land-use related controls and mitigations, such as affordable housing units. Moreover, CBAs can address economic development and investment concerns stemming from building projects, such as job programs that are not directly related to traditional land use matters. This systemic approach is essential for healthy, better functioning cities in an increasingly urbanized era.

The Zoning Mechanism. Besides the substance of zoning, there is a philosophical and structural choice that legislatures can make as to the nature of the codes and related procedures. The zoning code could be, under one approach, very specific, setting out a precise set of requirements and leaving little discretionary power for deviation. On the other hand, zoning legislation could describe only a few broad goals and leave to an administrative body great discretion, through negotiation with developers, on the approval of individual projects and any required conditions.

The first, "strict" approach arguably has benefits: it consistently addresses similar land use issues with well-considered and best-practice solutions; it is the most "fair," from normative and legal defense perspectives, by treating similar situations, owners, and developers consistently; its strict adherence to a blueprint limits the possibility of extra-legal favors and payments to influence outcomes that might occur in a discretion-based system; it provides predictable, and thus lower cost, results to owners, potential buyers/developers, the surrounding community, the municipality, and administrating agencies, and courts. In many ways, this first approach was typical of the initial form of zoning in the United States, marked by a top-down, government-dominated model (Camacho, 2013).

A system with greater discretion, however, has certain advantages: many land use decisions involve unique combinations of social, economic, political, and geographic factors, and need to be dealt with flexibly rather than through rigid, predetermined requirements; the municipality cannot adequately maximize social welfare without the ability to adjust to the myriad of particular situations that arise;

2003). Striking down large lot zoning: C&M Developers v. Bedminster Township Zoning Hearing Bd., 820 A.2d 143 (Pa. 2002).

adherence to a fixed blueprint can create unbearable hardships on owners, perhaps rising to the level of legal and constitutional violations (Krasnowiecki, 1980). There has been some migration of American zoning from the top-down approach to this second model, with bilateral negotiations between government and developers setting the required land use requirements. This is most extreme in the practice of contract zoning, where government agrees to rezone the property but subject to various conditions undertaken by the developer to mollify neighbors or mitigate environmental or neighborhood harms.

Moreover, the philosophical discussion of a strict vs. adaptable code is often mooted by the facts on the ground. Bargaining is a part of the process, as underscored by the sui generis development that has actually occurred in many places under zoning regulation (Fennell & Penalver, 2014). As Carol Rose has written, individualized changes are "the everyday fare of local land regulations." (Rose, 1983, p. 847). Zoning, as practiced, benefits from both elements – a clear, predictable set of a priori rules, and a degree of flexibility by decision-makers to address the inevitable complexity that people and policies generate.

The procedures necessary to achieve leeway under zoning, however, typically are quite complicated. For example, variances from the ordinance may be permitted but only in cases of "unnecessary hardship" and only if the "spirit" of the ordinance is observed, and an adversarial administrative hearing is required for approval of changes, reviewed by courts (Mandelker, 2003, p. 6–60). Additionally, contract zoning may be invalid under many state laws.[5] Importantly, current flexibility in zoning procedures—whether through the developer seeking administrative or judicial relief, or via bilateral contract zoning between the developer and the governmental unit—does not contemplate the participation of community members in striking the deal.

In contrast, CBAs allow *all* interested parties—the developer/owner, neighbors, immediate community, and, sometimes directly, the municipality—to participate and pursue their goals. CBAs thus provide needed flexibility in the zoning calculus through a consensual, inclusive process. CBAs build bridges between parties who ultimately will need to continue to interact and collaborate, prevent the hard feelings that can come with the sense of there being a winner and a loser in a judicial decision, and provide a cheaper and faster alternative than the litigation process.

Inclusiveness

Salkin and Lavine note that "[t]he ideals of inclusiveness, democracy and public participation remain fundamental to community-based [land use] planning." (Salkin & Lavine, 2009, p. 168). Community engagement in the planning process can help to reach more optimal solutions and avoid top-down mandates from professional planners and legislatures that do not truly meet civic needs. Salkin and Lavine

[5] See Hale v. Osborn Coal Enterprises, Inc., 729 So. 2d 853 (Ala. Civ. App. 1997); Mayor & Council v. Rylns Enterprises, 814 A.2d 469 (Md. 2002).

observe that a similar, and perhaps even more powerful, democratizing effect is in play with CBAs:

> Like community-based planning programs, [CBA coalitions] have drawn attention to the fact that the planning and development review process often fails to address the needs of historically disempowered low income, minority, and non-English speaking communities. While supporters of community-based planning have sought to change the planning and development review process to make it more inclusive and accessible, the CBA contract model allows community coalitions to bypass the traditional planning process entirely (Salkin & Lavine, 2009, pp. 177–178).

Thus, public accountability in enhanced by giving greater voice to more people. It has also been suggested that communal participation through CBAs can lead to fewer and less contentious public hearings as part of the governmental approval process, thus benefitting municipalities (McKean, 2015).

Transparency of Distribution of Benefits

Since the community at large experiences the negative externalities from a new project and expends its good will in welcoming the development, fairness and efficiency demand that the benefits given by the developer go to the community rather than a few self-appointed insiders. Use of CBAs brings transparency to arrangements between developers and community groups and leaders. Instead of the developer providing compensation via a quiet, side deal to a few individuals promising community support, a CBA—a formalized agreement open if not the general public but to a large number of stakeholders—provides for benefits to the broader community. The CBA structure allows the developer to avoid what has been termed the "graft problem" (Marcello, 2007, p. 665). While the developer may still be subject to demands for separate payments from self-appointed insiders in return for acceptance of the project, the existence of a CBA and the broad support it represents may provide an additional shield for the developer from such requests.

2.3 Potential Costs and Cautionary Notes with CBAs

Despite their advantages, there are potential costs and risks involved with the use of CBAs. These include the privatization of public planning, the loss of broad municipal-wide planning, and issues with the community negotiators.

Privatization of Public Land Use Planning

Vicki Been notes the hard choice facing municipalities as to how to treat CBAs: should cities consider these agreements to be valid engagements by developers with communities to gain support, or are CBAs tantamount to "zoning for sale?" (Been,

2010). There is an underlying concern that CBAs could be so influential that they cause the privatization of what should be a public process.

Been suggests that local governments could take one of three routes in response. First, cities could refuse to consider CBAs in the land use control process totally. Second, municipalities could recognize that CBAs are inevitable but only take into account CBA terms that are related to land use matters (not economic development), require developers to fully disclose CBAs during the land use process, ensure that the groups negotiating the CBAs are representative of the community, require local officials to approve the CBA, see that overall citywide land use interests are not compromised, and insist that local government be given the right to enforce the CBA. Third, instead of considering CBAs as part of land use approval, cities could evaluate them within the economic development process, although the line between the two may be hard to draw.

While CBAs can be helpful tools in the land use and community development arenas, Been provides a strong reminder that private CBAs should not trump necessary public processes. Indeed, approvals of a project, such as planning authorizations, formal zoning changes, variances, and issuance of building permits, can only be issued by government and following prescribed procedures.

Loss of Citywide Planning

CBAs are developer-driven initiatives for a limited locus in a city. There is some concern that overreliance on CBAs may undermine thoughtful public planning across the municipality and region (Janis, 2007). Some issues, such as affordable housing and economic development, may require a broad-based approach beyond the immediate neighborhood. Moreover, there is a risk that one neighborhood may capture developer benefits that would have gone to the larger community had there been no CBA (Been, 2010). Additionally, the CBA process may result in one neighborhood capturing public subsidies that might be better allocated elsewhere in the city (Been, 2010). The result may be distortions and inequality between neighborhoods. There may also be competition between neighborhoods for a limited number of development projects, spawning a race to the bottom in terms of received neighborhood benefits.

Composition and Functioning of the Community Representative

The negotiating group must truly represent "the community." There is a risk that the CBA will not express the wishes of the neighborhood majority because negotiators are not popularly elected nor even appointed by a government official (Baxamusa, 2008; Been, 2010). Moreover, the goals of both the developer and the community—broad acceptance of the project and participation in the benefits—cannot be achieved without representative negotiators.

Typically, no single organization can adequately give voice to all community concerns. Thus, a coalition of community groups representing various issues—e.g., employment and labor, housing, neighborhood and community services, environmental—often will negotiate for the community (Janis, 2007). Additionally, the developer should not be able to "cherry pick" the groups that he or she thinks will make for easiest negotiating partners (Been, 2010). "At their best, CBA coalitions are sufficiently broad and inclusive, and therefore effective in representing a collective set of interests in negotiations with developers and the public sector. But the breadth and consistency of support take enormous work, and may not be possible on every project." (Janis, 2007, p. 18). Roughly 100 reported organizations were involved in a Pittsburgh CBA negotiation and some 30 in the Staples Center expansion in Los Angeles (McKean, 2015, p. 140).

In addition to composition, other concerns have been reported about the representation afforded by some community groups: CBA negotiations and decision-making lack transparency; community groups may be unable to adequately press stakeholder interests during negotiations, because they lack accountability and there is the possibility of self-dealing; community groups lack negotiating and monitoring skills (Camacho, 2013; DeBarbieri, 2016; Wolf-Powers, 2010). Some techniques have been developed, however, to insure high-functioning coalitions. For example, some community teams have their participants execute an operation agreement containing ethical and procedural standards designed to prevent conflicts and to build team cohesion (Marcello, 2007). Moreover, the value of engaging stakeholders into the regulation of their neighborhood land and local self-governance may far outweigh the difficulties in crafting an effective and fair CBA mechanism (Camacho, 2013). To many residents of underserved neighborhoods, the current system is not working. A fairly constructed market solution may provide needed economic and social power.

3 Constitutionality of Community Benefits Agreements: Are They Takings?

A key inquiry is whether a CBA entered into by a developer works a taking of the developer's property that violates the U.S. Constitution. The Fifth Amendment of the Constitution provides that "nor shall private property be taken for public use, without just compensation." The Constitution thus contemplates that "takings" of property from individuals are permissible as long as there is the requisite public use and just compensation is paid. The usual taking scenario involves a conscious, *physical* taking of land by government, such as when land is acquired from an individual to build a public highway.

The Supreme Court has also determined that though there is no physical taking, there may be a regulatory taking of property if government passes legislation or takes other action that deprives the land owner of too much of the owner's ability to

use the property. The Court does not give a precise formula: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[6] Under this analysis, an owner might argue that he signed a CBA because of an express or implied governmental requirement and that this worked a regulatory taking entitling the owner to compensation. The fact that a developer initially signs a CBA does not prevent the developer from subsequently bringing a successful constitutional challenge. The doctrine of "unconstitutional conditions" allows a land owner to challenge a governmental action as a taking even after seeming to accept it (Siegel, 2009).[7]

There are various layers to a takings inquiry. First, there must be state action for there to be a constitutional violation. Thus, the first question is whether the CBA involved governmental or private activity. Second, it must be determined whether there was a sufficient diminution of property rights to rise to the level of a taking. Finally, the effect of the recent decision of *Koontz v. St. Johns River Water Management District* on CBAs must be considered.

3.1 State Action

As a predicate to a constitutional taking claim, there must be "state action." The Fifth and Fourteenth Amendments of the Constitution restrict government's intrusion on individuals, rather than agreements between private persons. It has been argued, therefore, that if a CBA is only between community groups and the developer, without a governmental entity being party to the agreement, there is no requisite state action (New York City Bar, 2010). Indeed, many CBAs are structured in this manner, perhaps with a concern about takings issues or simply because it is easier to negotiate without governmental participation.

As a general matter, however, there is likely to be state action—or at least significant vulnerability to such a claim—with the execution of many CBAs. First, sometimes governmental entities formally participate in the negotiations of CBAs and sometimes are signatories to the agreements (Baxamusa, 2008; Camacho, 2013; DeBarbieri, 2016; Gross et al., 2005; Marantz, 2015; Nadler, 2010; Salkin & Lavine, 2008).[8] A municipality might wish to directly participate in the CBA process to ensure that it meets the needs of the larger community and the city's fiscal and planning requirements. When the municipality is a direct participant in a CBA, it seems clear that the state action test is met.

Moreover, under various accepted doctrines, state action might also be found with less direct governmental involvement in CBAs. Thus, there may be state action under the "state compulsion test," when government actively engages in the process

[6] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[7] See Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

[8] See Marcello (2007, p. 659) (describing Denver plan where city representatives participated in negotiations).

to achieve a certain result; the "entwinement test," when government is entwined in the "management or control" of the private party"; or the "joint participation test", when private parties willfully participate in joint activities with government (Nadler, 2010, pp. 607–609). A court could well conclude under these tests that there is state action in the following situations even without *formal* governmental participation: when officials suggest the need for a CBA or refuse to vote on land use proposals until CBAs have been concluded (Been, 2010; New York City Bar, 2010).[9] Alternatively, governmental insistence on being granted the power to enforce a privately negotiated CBA would also likely constitute state action (Been, 2010).

Therefore, the claim that the bilateral nature of the agreement between community groups and developers removes the specter of state action and subsequent takings analysis has been ably criticized:

> If the "leverage" community groups have to convince developers to enter negotiations stems from an explicit or implicit requirement that the landowner enter into a CBA before seeking government approval of the land use proposal, the courts may view the negotiations as posing no less (and perhaps more) risk of "extortion," to use the Nollan court's term, than the local government's processes at issue in that case (New York City Bar, 2010, p. 41).

3.2 Requirements for a Taking

This then leads to the question of whether the deprivation rises to the level of a taking for which compensation must be paid. Exactions of land may be required by municipalities from developers in return for zoning or other land use regulatory approval (perhaps a zoning amendment, variance, subdivision approval, or building permit). The theoretical justification for exactions is the idea that developers should internalize the costs of their developments. Whether the project is held for investment or sold to end users, all expenses should be absorbed by the development. It would create an economic distortion and violate notions of fairness if the rest of the community were forced to absorb costs attributable to a development (Fennell, 2000, pp. 4, 19–20). Thus, cases uphold exactions by government when the developer is required, for example, to dedicate a strip of land to the municipality to add a new lane to an adjacent road if the users of the new development generate sufficient traffic to clog the existing road.[10] The developer should pay for creating this negative externality rather than making all taxpayers absorb the cost of expanding the road.

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[9] See Salkin and Lavine (2008, p. 119) (NoHo Commons CBA may have helped secure unanimous city council approval), p. 125 (government participation in Yale hospital expansion CBA); Partnership for Working Families (2016), http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect (Knightsbridge Armory CBA in Bronx, NY: "Shortly after announcement of the CBA, the developer who had entered the agreement was selected by the City of New York to build the project").

[10] See, e.g., Dowerk v. Charter Township of Oxford, 592 N.W.2d 724 (Mich. App. 1999); Sparks v. Douglas Cty., 904 P.2d 738 (Wash. 1995).

Moreover, instead of requiring an exaction of a physical piece of property, communities have required monetary exactions (also known as development impact fees) to mitigate development fallout (Byrne & Zyla, 2016). Thus, a town could charge a monetary exaction to pay for new classrooms in the local school when a new residential development brings in additional school children, or to pay for an additional sewer treatment plant.

The Supreme Court of the United States issued two major exaction cases with *Nollan v. California Coastal Commission*[11] and *Dolan v. City of Tigard*.[12] In these cases, the Court held that governmental entities may exact an interest in land from a developer only to ameliorate a harmful externality created by the development. Government cannot use zoning, subdivision, permitting, or the approval process to extract property concessions from developers that are not related to resolving community harms generated by the project (Fennell, 2000; Fischel, 1995; Merrill, 1995). *Nollan* requires a "nexus" and *Dolan* a "rough proportionality" "between the property that the government demands and the social costs of the applicant's proposal." Thus, in *Nollan*, the court struck down a governmental exaction of a public beach easement required in return for issuing a building permit because, at most, the proposed structure would interfere with the public's view of the beach and there was no effect on access.

3.3 Community Benefits Agreements and Takings Rules: The Koontz Decision

Koontz v. St. Johns River Water Management District[13] broke new ground in the Supreme Court's takings and exactions law. The Court extended the theory of *Nollan* and *Dolan*—which had only applied to exactions of land rights—to monetary impact fees charged by municipalities. Some cities require cash contributions from developers, rather than transfers of land rights, to mitigate harms caused by development. Under certain circumstances, cash payments are simply more practical and sensible, such as requiring a developer to contribute a fair share of a new school building that would serve children in the development as well as others in town.

In *Koontz*, an owner sought to develop his property which included wetlands. Under state law, governmental approval of the building plan was required to mitigate environmental damage. The owner submitted plans, and the state agency offered to approve them if, among other requirements, the owner would pay for mitigation work on other parcels owned by the agency. The owner brought an action alleging that the payment amounted to an unconstitutional taking. The lower court

[11] 483 U.S. 825 (1987).

[12] 512 U.S. 374 (1994).

[13] Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586, 2595 (2013).

in *Koontz* followed existing doctrine that demands for money could not be challenged as takings of "property."

The Supreme Court reversed, saying that the claim did not fail because the government was requiring the payment of money rather than an easement on the owner's land. A monetary exaction would also be judged by the rules of *Nollan* and *Dolan*, to determine whether there were adequate nexus and proportionality between the problem caused by the development and the monetary charge. The importance of *Koontz* is that monetary payments, such as impact fees, are now subject to takings scrutiny. The decision has both been praised (Epstein, 2015) and condemned (Echeverria, 2014).[14]

The *Koontz* decision and increased scrutiny of monetary payments heightens the possibility of successful challenges to CBAs. A developer could claim that he or she was coerced into a CBA and that its requirements amount to a taking. *Koontz* explicitly makes clear that the fact that a developer agreed to a condition in order to get governmental approval does not prohibit it from bringing a subsequent challenge. Thus, *Koontz* would require that the obligations placed on the developer, whether in the form of transfer of property rights or cash payments, would have to pass the nexus and rough proportionality tests.

CBAs may require developer contributions similar to property rights exacted in typical land use regulatory proceedings. While it is hard to predict results, certain aspects of CBAs, such as street improvements due to increased traffic from the new development, would seem sustainable under the *Nollan* and *Dolan* nexus and proportionality tests because they attempt to curb negative externalities from the development. Other property rights requirements placed by developers in CBAs may not be permissible, though. Consider a CBA obligating the developer to dedicate a portion of his or her property for a playground. A court would have to determine whether obligation was constitutionally permissible because it mitigated stress on existing recreation resources caused by the development or whether it was an improper attempt to free ride by forcing the developer to provide land for a desired amenity.

Takings scrutiny would also extend to provisions of the CBA that in effect requires cash expenditures by the developer, much like the owner in *Koontz* was ordered to pay for maintenance work on government property. Thus, CBA provisions creating developer employment obligations, financial contributions to organizations and programs, and other economic development and community building expenditures, would be closely examined by courts. Again, while it is hard to predict results, these central aspects may not survive takings challenges. The *Nollan* court was concerned over the use of the land regulation process to extract concessions unrelated to mitigating harms created by building projects. Just as the court in *Nollan* found that a beach easement was unrelated to the building permit for the house, a court could find that a new development does not cause employment problems in a

[14] Professor Epstein's praise is only partial as he would have preferred a more "robust critique of all exactions" and a finding that there had been a total taking if government had not rescinded its order (Epstein, 2013).

neighborhood, and whether anything might improve them. Thus, CBA job requirements and similar provisions might fail the nexus and proportionality tests.

4 Social Justice, Property Rights, and Corporate Social Responsibility

Narratives of CBAs often describe a binary battle between a beleaguered community without economic or political power and a well-heeled developer seeking to extract profits without regard to the neighborhood or its residents. In this rendition, the community seeks social and economic justice while the developer resists the seizure of his or her private property through "extortion." This section will describe these positions, relying on the narratives themselves, and then suggest that this rigid, binary approach misstates the reality of community engagement by many modern companies.

4.1 CBAs as Social Justice

The CBA movement has been described in numerous accounts as an attempt by disenfranchised, politically and economically weak communities to obtain a place at the table and a fair share of the benefits of redevelopment. It is "the grassroots 'Davids' versus the developer 'Goliaths'" (Cain, 2014, p. 942).

Power Imbalance

One common theme focuses on the power imbalance between proponents of development—developers and "gentrifying" owners—and lower-income residents who were already in place. Re-urbanization has brought increased growth in the numbers of middle and upper-middle income consumers and residents visiting and living in city centers (Janis, 2007). Moreover, redevelopment of cities with new entertainment facilities, office buildings, retail, and upscale residential buildings, has usually occurred in areas inhabited predominately by low-income residents and people of color because land in these areas tends to have low market values (Laing, 2009). "While many of these projects are bringing sorely needed jobs and tax revenues back to areas that have been disinvested, there is usually no guarantee that the 'ripple effects' of the projects will benefit those residents who need them most." (Gross et al., 2005, p. 4). Some have feared that redevelopment might lead to economic exploitation and displacement of low-income, disenfranchised African, Latin, Asian and Native (ALANA) people (Laing, 2009).

Prior successful grassroots opposition to development has usually only occurred when it was mounted by affluent residents (Saito, 2012). CBAs, in contrast, have empowered lower income residents to assert their interests in the development process.

Economic and Redistributive Justice

Economic and redistributive justice underlies some support for CBAs. Some proponents reject the view that "competition in a free market ultimately benefits everyone in society through increased jobs for residents and tax revenue for cities" (Saito, 2012, p. 145). They believe that "[g]roups with interests in growth manipulate the market in ways that reflect the general inequality in society," using "their political influence to support their economic interests, while working against those of others, particularly low-income residents whom the development will displace" (Saito, 2012, p. 145). CBAs thus are part of "innovative campaigns that demand growth with equity" that seek to require "accountable development" in the face of increasing income inequality" (Parks & Warren, 2009, p. 89).

Employment and Labor Ties

Moreover, employment promises are often central to CBAs. By focusing on quality jobs, "the new accountable development movement brings economic inequality and redistribution claims to the center of contemporary urban politics" (Parks & Warren, 2009, p. 89). Given the centrality of job issues, unions or other labor or jobs-related organizations often collaborate with neighborhood groups in obtaining a CBA. It may be, however, that community and interests may diverge at some points, but it is claimed that there is sufficient basis for common cause (Laing, 2009).

Environmental Justice

Environmental justice also underlies CBA activity. Development can expose community residents to construction-based environmental hazards, such as exhaust, particulate emissions, and noise, and to ongoing environmental harms, especially from industrial sites (Cain, 2014; Gross et al., 2005; Salkin & Lavine, 2009). Environmental groups participate in "private" CBAs to achieve environmental remediation of the negative effects of development.

Failure of Local Government

Community organizations supporting CBAs sometimes refer to a failure of local government, both in terms of planning to meet the needs of local communities and enforcement of existing regulations. First, some claim that government engages in insufficient land use planning to protect local community concerns in the face of private interests offering perceived incentives (Gross et al., 2005). It has been asserted that local coalitions are needed to counterbalance the power of developers that allegedly has become largely unregulated by government because of increased constitutional rights of land owners (Baxamusa, 2008). Some have argued that government has further failed by subsidizing "displacement and exploitation of poor people of color" through gifts of public land and advantageous financing (Laing, 2009, p. 129).

Second, there are concerns about the adequacy and transparency of governmental enforcement of existing regulations that should be applied to projects affecting local neighborhoods.[15] CBAs provide community groups with independent means to address inadequate enforcement of existing rules by local government through rights granted in the private agreements. This expression of support for democratic, egalitarian, local control over development and disappointment with government creates some degree of tension with the goals and efforts of professional, citywide planning.

4.2 Property Rights

CBAs can be characterized as exactions of private property by local government. Exactions have been decried by some narratives as being governmental "extortion," attempting improper wealth distribution and majoritarian power grabs, and yielding inefficient land allocations.

Exactions as "Extortion"

Although many developers may recognize the validity of exactions under certain conditions, they may resent government overreaching and attempts to "extort" contributions of land, physical improvements, or monetary payments in return for land use approvals when the development is not creating externalities on the rest of the community. Justice Scalia introduced the "extortion" term into the Supreme Court discussion in *Nollan* and it was repeated by Justice Alito in *Koontz*:

[15] See Parks and Warren (2009, pp. 97–98) (contrasting robust California environmental review as providing important general transparency to the community with the limited process in Chicago and other cities and states).

> Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in "out-and-out… extortion" that would thwart the Fifth Amendment right to just compensation.[16]

Developers appropriately feel that if the community desires to acquire land or improvements unrelated to the development plan, the community should pay for it or forgo it. The developer should not be forced to absorb that cost simply because the developer is in the vulnerable position of seeking necessary land use approvals.

A developer who feels compelled to sign a CBA, requiring it to provide land or funds, similarly could feel "extorted" by the land use approval system. Professor Richard Epstein sums up the strong pro-property rights perspective that could be applied to an owner objecting to imposition of a CBA: "The government thinks that it is within its right to insist that it need issue permits for development only to private parties who toe the line on the conditions that it imposes" (Epstein, 2013, p. 133) As Justice Alito stated in *Koontz*, the individual is protected, however, from such intrusion: when a person "refuses to cede a constitutional right in the face of *coercive pressure*, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."[17]

Wealth Redistribution and Political Power

Owners may resent exactions to the extent that they are seen or intended as an attempt at wealth redistribution between community members and "rich" developers. "[T]he deepness of a developer's pocket should not affect his rights to be free from general taxes on development activity and to receive equal net benefits from municipal services" (Ellickson, 1977, p. 467). In any case, such costs are likely to be passed on to consumer purchasers or renters of the properties (Eagle, 2014, p. 15).

Exactions may also reflect an unfair exertion of political power by existing owners over those who have not yet arrived and so do not have a vote (Rosenberg, 2006, p. 261). A municipality might follow the wishes of current voters by imposing an exaction that will shift costs for improvements to purchasers in new developments in town. Professor Epstein describes a fundamental conflict between government as representative of majoritarian interests and the individual owner: "[M]ost government agencies are convinced of the worth of their public mission, so they would like to find a way to move forward with their regulatory programs without having to pay anything at all" (Epstein, 2013, p. 138).

[16] Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586, 2595 (2013).

[17] Ibid.

Exactions and Efficiency

Exactions serve efficiency goals when they force developers to internalize actual and exclusive costs of their projects. It would create distortions in land prices if developers passed the cost of all externalities created by the development, such as increased pressure on roads, on the rest of the community's taxpayers. Commentators caution, however, that exactions may create unequal economic burdens on developers and new buyers when government in the past had paid for the same improvements for prior owners out of general revenues (Ellickson, 1977, pp. 455–457, 465–467; Eagle, 2014, pp. 10–12). Professor Ellickson states:

> To ensure that new development bears its fair share of the costs of financing the urban infrastructure, however, development charges levied on homebuilders to finance a specific service should be permitted if the charges help equalize the discounted net benefits each dwelling unit receives from that service over time.[18] (Ellickson, 1977, p. 468).

In the suburban context, failure to control municipal anti-growth regulations, including exactions, might lead to monopolies of housing supply by current owners and other inefficiencies in land allocation (Ellickson, 1977, p. 387).

4.3 Another Path: Corporate Social Responsibility

A corporate social responsibility (CSR) framework offers an opportunity for breaking out of the binary dialectic of assessing CBAs either as a vehicle of social justice or a violation of property rights. Although a company undertakes CSR voluntarily, rather than by governmental compulsion, it does so because of the mutual advantage for the corporation and the community. This win-win philosophy can be employed to make the case for increased use of CBAs, and to break out of the divided dialogue.

CSR in General

Over the past 20 years, many global corporations have taken the lead in finding solutions to social, environmental, and economic challenges (Korngold, 2014). This represents a change from the past for most of these companies. Previously these efforts had been the province of the nonprofit sector—companies often had been the cause rather than solution of the problems, and if business had wanted to do good work it usually made financial contributions to charities. By the 1990s, however, some corporations become more strategic by focusing their funding on charities connected to their business: a tight economy pushed them to be more disciplined in

[18] "Net benefits" are the municipal funds spent providing the service for the unit less charges for that service collected from the owner. Ellickson (1977, p. 467).

all spending, businesses noticed that past contributions had been given somewhat erratically, and they realized that donations could be used to invest in strengthening the communities in which they operated while also building goodwill (ibid). Moreover, companies recognized that they could align their contributions with causes that improve their direct business interests, thus enhancing revenues, their brands, and image (ibid). For example, banks invested in small business development and economic literacy.

With the start of the twenty-first century, some leading corporations have moved to the next stage: embracing the concepts of social, environmental, and economic opportunity as part of their core missions (ibid). They were motivated by two reasons. First, they saw that they could only thrive if they operated in a healthy and sustainable environment with consumers who had the economic ability to purchase their products. Second, these companies understood that they could increase revenues by producing products for a market that was demanding sustainable, socially responsible goods. For these companies, social issues were no longer a "feel good" adjunct to strategy or a public relations opportunity, but were a way to make money (ibid, p. 5). These companies have advanced social agendas in a variety of areas, such as economic development, climate change and energy, healthcare, education, and human rights. Some of the leaders that have internalized a focus on environmental, social, and economic development issues as part of core strategy include Unilever, Intel, GSK, Ecolab, Vodafone, and Safaricom.[19]

Even for companies with less robust corporate social responsibility engagement, the data reveals a compelling growth of corporate focus on these issues. CSR has become standard practice at major businesses. In 2015, 92% of the G250 companies (the top 250 of the Global Fortune 500) reported on CSR activity, compared to 35% in 1999; in 2015, 73% of the N100 companies (the largest 100 companies in each of 45 countries) made CSR reporting, compared to 24% in 1999 (KPMG, 2015, p. 15). Over 9000 businesses globally have signed the UN Global Compact with the mission to "align strategies and operations with universal principles on human rights, labor, environment and anticorruption and to take action to advance societal goals."[20]

[19] Sale of sustainable products represents 21% of revenues among a sample of the S & P Global 100 in 2013; this grew at least six-fold between 2010 and 2013 (Center for Effective Corporate Philanthropy, 2015, p. 8).

[20] United Nations, https://www.unglobalcompact.org/what-is-gc (Global Compact mission); https://www.unglobalcompact.org/what-is-gc/participants/search?utf8=%E2%9C%93&search%5Bkeywords%5D=&search%5Borganization_types%5D%5B%5D=2&search%5Borganization_types%5D%5B%5D=5&search%5Bper_page%5D=10&search%5Bsort_field%5D=&search%5Bsort_direction%5D=asc (9000 businesses).

CSR in the Real Estate Sector

Various real estate developers have embraced CBAs. More generally, they have understood the importance of building their bottom lines by helping to provide for sustainable, high-functioning, value-preserving communities.[21] Real estate developers who chafe at engaging in CBAs because they feel coerced or extorted by government or the community might consider the more profound CSR lessons from leading-edge corporations. First, as path finding companies believe, developers will likely build value and prosper, particularly over the long term, only if people living near their developments are safe, healthy, and able to support the property as tenants and customers and only if the host communities and cities are sustainable and thriving. Second, as the general corporate sector has realized, there are profits to be made by developers by building free-standing developments for traditionally underserved populations or including opportunities for such persons within general projects. Various developers already have prospered by building affordable housing and by revitalizing urban commercial strips.

CBAs may continue to offer a means to directly engage neighborhoods in the development process and provide a vehicle for mitigating the harms and even sharing some of the value of major projects. This vehicle, however, may be more vulnerable than ever to takings challenges after the *Koontz* decision. Corporate social responsibility may offer a new way to conceptualize developer investment in the community that yields a "win-win"—benefits to the community and an increased bottom line for the company.

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[21] Consider just a few examples: Boston Properties, a leading real estate investment trust, discusses the importance of community engagement in its sustainability report. Boston Properties (2016, p. 18). Forest City, another major REIT, reviews the importance of community development, employment and apprenticeship programs, and women's and minority businesses in its report. Forest City (2015).

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Part III
Economics of Zoning: A Case-Study Analysis

Zoning in Reunified Berlin

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Abstract While urban renewal programs have become widely-used policy measures to target urban development, the reasons why certain areas are more responsive to policy interventions than others are less known. With this study, we address some of these issues by analyzing an urban renewal program in Berlin, Germany, with 22 designated renewal zones between 1990 and 2012. We separately estimate the effects of the renewal policy on property prices for each respective redevelopment area by comparing price developments in these areas to a series of runner-up areas and to geographically close transactions. We find a considerable amount of heterogeneity. While some areas profit from the renewal policies, there are several areas which develop quite differently and end up with a decrease in property prices due to the urban renewal policy.

1 Introduction

Urban renewal programs have become widely used policy measures to address urban development in many cities. There exists a growing literature providing aggregated ex-post evaluations of such policies. Less is known, however, about the reasons why certain areas are more/less responsive to external stimuli than others, i.e. why certain areas experience large and lasting positive effects due to policy interventions while others do not display effects, or are even worse off after the policy.

With this study we address some of these issues. We analyze an urban renewal program in Berlin, Germany, with 22 designated renewal zones between 1990 and 2012. Renovations/buildings upgrades in these zones were eligible for public funding through tax abatements, subsidies, and other financial support. Additionally, the policy

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attempted to upgrade public spaces in these areas. This includes the building and renovation of roads and squares, schools, playgrounds, and sanitary improvements.

We separately estimate the effects of the renewal policy on property prices by comparing them to price developments of two kinds of control groups. The first control group consists of so called investigation areas deemed suitable as urban renewal areas, which were ultimately not designated. The second kind of control group is defined by geographical restriction: we compare price developments in the renewal areas to all transactions in a 500–3000 m buffer around the respective renewal area.

We found a considerable amount of heterogeneity in the effects of the policy. While some areas profit from the renewal policies, there are in both specifications several areas which develop quite differently and end up with a decrease in policy prices due to the urban renewal policy. Graphical analyses show that the strongest price increases occur in the most central areas in the former eastern part of Berlin. These areas were among the most degenerated prior to the policy measure.

The literature evaluating urban revitalization policies is growing. Several studies have investigated the general economic effects of urban revitalization polices in recent years. Ahlfeldt et al. (2016) provide an evaluation of the aggregated impact of the same Berlin urban renewal policy package as this study. Using a quasi-experimental research design, they track housing prices in Berlin over 20 years and compare transactions in the renewal areas to several control groups. They find that the housing stock condition in the targeted areas improved compared to similar areas, and that transactions in the renewal areas realize a yearly price premium compared to properties not targeted by the policy. They do not find evidence for a causal relation between this price premium and the policy, instead the price increases can be attributed mostly to centrality and endowment with urban amenities.

Rossi-Hansberg et al. (2010) analyze a $14 m urban renewal program in Richmond, Virginia, consisting of four renewal areas. They compare housing prices in the selected areas to a runner up area and find evidence for positive but quickly decreasing housing externalities. Ding et al. (2000) analyze the effects of residential investment policies on surrounding property values in Cleveland, Ohio. They find positive but spillover effects within the distance of one block. Schwartz et al. (2006) find comparable results investigating the external effects of housing investment in New York City, using a combination of a difference in difference design and hedonic pricing.

Leather and Nevin (2013) look into a housing redevelopment program in the United Kingdom designed to target disadvantaged housing markets. Santiago et al. (2001) evaluate the effects of public housing programs on property prices nearby and find that the effects depend on the initial socio-demographic composition of the observed neighborhoods. Larsen and Hansen (2008) investigate the socioeconomic effects of an urban renewal policy in Copenhagen, Denmark. Galster et al. (2006) looks into a revitalization program in Richmond, Virginia, to investigate which amount of an initial investment into a declining neighborhood might suffice to return the area on a positive trajectory.

Recently, several contributions have investigated similar policies and their effects on housing markets outside of the United States (i.e., Ahlfeldt & Maennig, 2010; Lazrak et al., 2010, on heritage policies).

The remainder of the chapter is organized as follows: Sect. 2 provides background information about the urban renewal program and the political setting, while Sect. 3 presents the empirical strategy. Section 4 contains the results, and the final section summarizes and concludes.

2 Background

After the German reunification, large parts of the housing stock in Berlin were degenerated, especially in the eastern part of the city. These issues manifested in an overall bad condition of the building substance of original housing stock and inner city district centers, including massive vacancies, and in an increased need for renovation. As policy makers recognized these issues as pressing for the development of Berlin as a unified city and large scale public policies were fundable after the reunification, they instigated the *First Berlin Renewal Program.*

The program consisted of a group of redevelopment areas eligible for public funding, and incentivized owners to renovate their buildings. The selection of these renewal areas can be summarized as follows: after a pre-selection of hotspots of urban decline, so called" investigation areas" by the Berlin Senate, in depth analyses of the sociodemographic structure and the status of the housing stock were provided by private planning agencies. These analyses include propositions for the exact location and size of the renewal areas. Finally, the Senate of Berlin officially designates the renewal areas. For details on the selection process see Maennig (2012) and Ahlfeldt et al. (2016).

The investigation areas were formed in July, 1992, and initially comprised 39 areas. In the following years (1993–1995), the Senate of Berlin designated 22 renewal areas, comprising an overall area of about 8100 km^2, 5723 plots, and about 81,500 dwelling units, with an average population of 5000 residents per renewal area (Senatsverwaltung für Stadtentwicklung Berlin, 2001).

Table 1 provides an overview and some descriptive statistics over the renewal areas initiated. Figure 1 displays the location of the renewal areas (*red*) and the investigation areas (*blue*). Most of the renewal areas were located in the former eastern part of Berlin. The five renewal areas in former West Berlin are much smaller than their eastern counterparts, which reflects that the situation of the housing stock was considerably better in West Berlin.

The Berlin program can be divided in two main phases: in the first half (roughly 1993–2002) vacancies and bad building substance were the main drivers of the renewal program. The incentives for private investments in the building stock

Table 1 Renewal area spillover effects

Name	Start	End	Area (km^2)	Properties	Dwelling Units	Residents
Samariterviertel	09.10.1993	10.02.2008	0.339	263	5302	8324
Warschauer Strasse	04.12.1994	28.04.2011	0.381	227	5110	8599
Traveplatz Ostkreuz	04.12.1994	11.07.2010	0.351	204	4380	6964
Kaskelstrasse	04.12.1994	10.02.2008	0.221	248	1665	3394
Weitlingstrasse	04.12.1994	28.01.2009	0.503	331	4214	5337
Spandauer Vorstadt	09.10.1993	10.02.2008	0.671	632	5809	8771
Beusselstrasse	04.12.1994	21.02.2007	0.106	93	2314	3045
Rosenthaler Vorstadt	04.12.1994	28.01.2009	0.376	373	4809	6794
Stephankiez	10.11.1995	21.02.2007	0.063	54	1288	1860
Soldiner Strasse	10.11.1995	21.02.2007	0.019	11	447	661
Wederstrasse	10.11.1995	11.07.2010	0.246	233	1341	2079
Kottbusser Damm Ost	10.11.1995	21.02.2007	0.025	21	380	522
Kollwitzplatz	09.10.1993	28.01.2009	0.607	476	6519	11,412
Helmholtzplatz	09.10.1993		0.819	560	13,338	21,211
Winsstrasse	04.12.1994	28.04.2011	0.348	219	4850	8568
Wollankstrasse	04.12.1994	28.04.2011	0.685	338	3386	7719
Teutoburger Platz	04.12.1994	12.02.2013	0.498	316	4432	7950
Komponistenviertel	04.12.1994	11.07.2010	0.339	477	3443	7400
Boetzowstrasse	10.11.1995	28.04.2011	0.381	191	3072	6211
Altstadt Kiez Vorstadt	09.10.1993	21.02.2007	0.351	225	1105	2115
Niederschöneweide	04.12.1994		0.221	97	799	1368
Oberschöneweide	10.11.1995	11.07.2010	0.503	255	3465	5375

The data for area, properties, dwelling units, and residents are from the Berlin administrative unit for urban development and environment (Senatsverwaltung für Stadtentwicklung Berlin, 2010). The Renewal Area "Teutoburger Platz" was deregulated after the end of our observation period (August 2012). The data for the areas "Komponistenviertel" and "Niederschöneweide" are from 2010

included tax reductions, loans, cash advances and further financial support. By 2000, more than 50% of the housing units in the renewal areas had been modernized (Senatsverwaltung für Stadtentwicklung Berlin, 2005). In the post-2002 phase, due to the progress made during the post-unification phase and an increasingly tight public budget, the focus changed: It was restricted to improvements of the social infrastructure and living quality of the neighborhood. Private modernizations were no longer co-financed through public investments, but significant tax abatements remained as an implicit subsidy.[1]

Until 2009, the expenses comprised more than €1.8 bn ($2.3 bn USD, exchange rate 2015) of public investments, amounting to about €880 m ($1.13 bn USD) for modernization and reinstatement, and about €546 m ($730 m USD) for expenses in

[1] Generally, modernization costs for own use or renting can be deducted from taxable income over a runtime of 10–12 years. A detailed explanation is provided in § 154 and 177 in the code of building law (BauGB), and § 7h, 10f, and 11a of the code of income tax law (EStG).

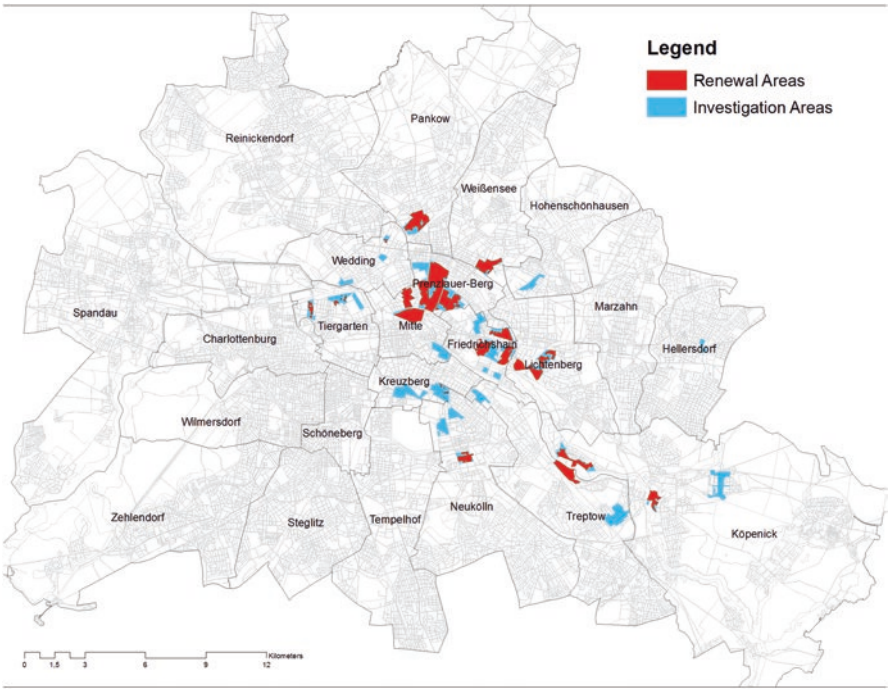

Fig. 1 Renewal geography. Own illustration based on the urban and environmental information system (Senatsverwaltung für Stadtentwicklung Berlin, 2006). *Red* (*blue*) areas indicate renewal (investigation) areas

infrastructure and social environment. The remaining disbursements consist of preparation costs (€75 m/$97 m), allowances (€115 m/$150 m), other regulatory measures including compensations (€181 m/$235 m), and other building measures (€63 m/ $81 m).[2] The average expenses per renewal area amounted to about €80 m ($102 m USD), translating into per capita expenses of €16,000 ($20,600) distributed within a period of some 15 years.

3 Data and Empirical Strategy

3.1 Empirical Strategy

We use an established combination of hedonic (Rosen, 1974) and differences-in-differences (Card and Krueger, 1994) methods to estimate the effect of the policy measure discussed above. Specifically, we separately estimate the cumulated effect

[2] Compare (Senatsverwaltung für Stadtentwicklung Berlin, 2010), where the local administration (Senatsverwaltung Berlin) provides detailed budget accounting information for the different time periods. More up-to-date figures are not yet available to the best of our knowledge.

on property prices after 15 years (=average runtime of the renewable policy) for each respective renewal area. The rationale of the quasi-experimental approach is to compare the areas exposed to the policy (the treatment) with areas as similar to the treatment areas as possible, but not exposed to the policy (the control group). Additionally, we only compare these two groups after the treatment has started.

We include a set of observable property and location characteristics discussed in the data section. We also control for otherwise not observed time-invariant location characteristics via a fixed effects defined for 323 traffic cells.[3] Standard errors are clustered on the same level. Macroeconomic factors that are assumed to be invariant across the treatment and control groups are captured by year fixed effects. We control for time varying effects by adding distance to CBD (interacted with a post treatment indicator).

3.2 Control Groups

Figure 2 displays the development of nominal property prices in the renewal areas, the investigation areas, and the rest of Berlin. The figure illustrates how important it is to select appropriate control groups when carrying out thorough policy

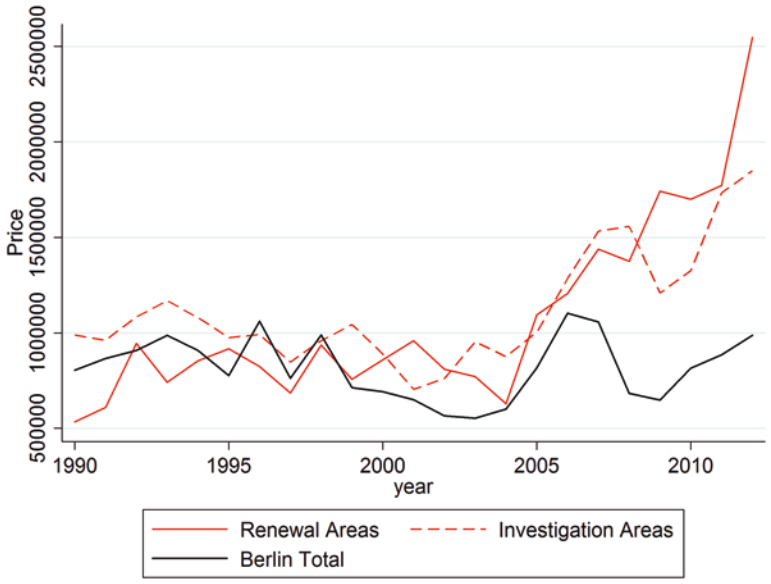

Fig. 2 Property price trends in Berlin. Own illustration

[3] Traffic Cells (Verkehrszellen) are statistical areas originally used by the local administration to analyze traffic. There exist 323 traffic cells in Berlin, the average size is 2.7 km^2 (105 mi^2).

evaluations. We use two separate control groups, the investigation areas which were considered but ultimately not designated as renewal areas, and a geographical control group based on distance to the renewal area.

The first control group are the investigation areas. These areas have been considered eligible to become designated renewal areas, but have ultimately not been selected. We argue that these areas share many of the building substance and sociodemographic structure with the renewal areas. Table 3 in the data section displays some descriptive statistics comparing the renewal areas and the investigation areas.

The second control group is based on proximity. It encompasses all transactions within a 500–3000 m distance to the renewal area, excluding all other renewal areas (and their 500 m buffers). The rationale is that geographically close transactions should be more similar to the treated transactions. To avoid confounding effects of the renewal policy and the control group, the 500 m buffer around the renewal areas is omitted.

3.3 Data and Descriptive Statistics

Berlin, Germany, in 2012, counted some 3.3 m inhabitants and about 1.9 m dwelling units. About 14% of the population are non-German citizens, and the unemployment rate was about 13%. The overall area amounted to some 892 km^2 (344 mi^2). The center is densely populated, the overall building structure is a mix of historic building (aged about 100–130 years), buildings put up after World War II to substitute for the destroyed building stock (age about 60 years), and newer buildings.

We observe all transactions of developed land that took place between January 1990 and August 2012—about 70,000 transactions. The data set includes price, transaction date, location, and a set of parameters describing building/plot characteristics and is obtained from the Committee of Valuation Experts Berlin 2012 (Gutachterausschuss Berlin). The building characteristics include floor space, plot area, surface area, land use, and location within a block of houses, among other variables. Additionally, we merge a set of distance measure including the distance of the transactions to the nearest public transport station, school, public park, lake or river, the central business district, and the nearest main street.

One of the potential bias of our results could be induced by gentrification, as this could lead to an upgrade of certain neighborhood, but should not be attributed to the policy. We thus control for proximity to urban consumption amenities by estimating a kernel density smoothed surface based on the location of bars, restaurants, and bars in 2012 with a kernel radius of 2000 m and a quadratic kernel function (Silverman, 1986). The data stems from the open street map project.[4] The resulting kernel density smoothed surface is displayed in Fig. 1.

The boundaries of the renewal have been integrated into a GIS framework based on maps obtained from the Berlin Senate Department. The 22 renewal areas have an

[4] See: www.openstreetmap.org

Table 2 Comparative Statistics: 1990–2012; prices in 2012 terms

	Renewal areas	Invest. areas	Berlin (total)
Price [€, CPI adjusted]	1,166,478.7	1,320,897.2	994,908.1
	(1,614,568)	(1,553,772.5)	(2,711,511.8)
		[−9.564]	[10.626]
Building age	100.8	95.29	63.19
	(21.9)	(25.77)	(36.64)
		[25.160]	[171.735]
Condition good [%]	10.3	8.24	21.8
	(30.4)	(27.5)	(41.3)
		[6.776]	[−37.829]
Condition bad [%]	42	28.2	14.7
	(49.4)	(45)	(35.4)
		[27.935]	[55.263]
Floor space index (floor space/lot size)	2.664	2.707	1.214
	(0.998)	(1.238)	(1.292)
		[−4.309]	[145.291]
Lot size	863.7	919.4	1040.1
	(923.8)	(978.8)	(2746.7)
		[−6.029]	[−19.095]
Share of non-German population [%]	13.7	20.6	10.7
	(7.21)	(15.1)	(12.1)
		[−95.700]	[41.609]
Single family home [%]	0.387	3.16	46.5
	(6.21)	(17.5)	(49.9)
		[−44.654]	[−742.560]
Apartment building [%]	33.9	40.5	20.2
	(47.3)	(49.1)	(40.2)
		[−13.953]	[28.964]
Mixed use building [%]	59.1	48.7	20.4
	(49.2)	(50)	(40.3)
		[21.138]	[78.659]
Commercial use building [%]	2.81	1.76	1.65
	(16.5)	(13.2)	(12.7)
		[6.364]	[7.030]

Prices are in 2012 Euros. Standard deviations in parentheses. The percentage standardized bias [in brackets] is the difference between the means of the treated group and a control group normalized by the standard deviation of the treated group

average size of about 0.37 km^2 (median 0.35), while the investigation areas have an average area of 0.43 km^2 (median 0.36).

Table 2 displays descriptive statistics comparing the renewal areas, the investigation areas, and the rest of Berlin. While the former are relatively similar, the structural differences to the latter are substantial. This reflects the importance of the appropriate control group selection.

4 Results

Table 3 summarizes the results of a series of regressions estimating the effect of the urban renewal policy on property prices separately per area. The effects compare the price increase in the respective renewal area with the price development in the investigation areas. To avoid confounding effects, all transactions inside other renewal areas have been omitted from the estimation.

To keep the presentation short, we restrict ourselves to the cumulated level shift after 15 years. Additionally, we report the implied yearly appreciation rate, the point estimate, the t-statistic, as well as the size of the employed subsample. The results display considerable treatment heterogeneity. While many of the estimates show a substantial price increase, there are several areas which report price decreases due to the policy. Figure 3 illustrates the distribution of the effects. While the effect is centered on zero, the treatment heterogeneity is clearly visible.

Table 3 Renewal area effects: investigation areas

Area	Cumulated change (%)	Appreciation rate (%)	Coefficient	t-statistic	Observations (Subsample)
Helmholtzplatz	62.139	4.143	0.483***	2.852	1415
Spandauer Vorstadt	204.567	13.638	1.114***	12.904	1349
Kollwitzplatz	88.419	5.895	0.634***	5.027	1361
Samariterviertel	35.486	2.366	0.304***	3.362	1327
Altstadt Kiez Vorstadt	−21.147	−1.410	−0.238***	−3.012	1271
Niederschöneweide	−24.071	−1.605	−0.275***	−3.344	1243
Teutoburger Platz	60.527	4.035	0.473***	4.044	1343
Winsstrasse	54.196	3.613	0.433**	2.539	1369
Warschauer Strasse	18.920	1.261	0.173	0.862	1331
Komponistenviertel	20.232	1.349	0.184*	1.907	1343
Traveplatz Ostkreuz	65.655	4.377	0.505***	5.346	1297
Wollankstrasse	38.122	2.541	0.323***	3.493	1319
Beusselstrasse	−46.926	−3.128	−0.633***	−8.085	1253
Rosenthaler Vorstadt	108.309	7.221	0.734***	13.270	1347
Kaskelstrasse	16.887	1.126	0.156**	2.737	1319
Weitlingstrasse	−2.077	−0.138	−0.021	−0.126	1343
Wederstrasse	−57.981	−3.865	−0.867***	−4.914	1235
Boetzowstrasse	89.174	5.945	0.637***	7.376	1331
Oberschöneweide	30.157	2.010	0.264***	3.351	1305
Stephankiez	0.188	0.013	0.002	0.035	1259
Soldiner Strasse	68.945	4.596	0.524***	4.460	1197
Kottbusser Damm Ost	11.165	0.744	0.106	0.701	1205
Average	37.313	2.488	–	–	1307

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$. We only report the cumulated level shift after 15 years, usual controls are included. The last column displays the number of observations included in each regression, including treatment and control group

Figure 3 alos displays the geography of the effect distribution in Berlin. It displays the magnitude of the estimated effect over the various renewal areas. Areas shaded in green have experienced a strong increase in price levels due to the policy, while areas shaded in red have experienced a decrease. Yellow marks areas where the 15-year cumulated effect has been rather neutral.

Table 4 and Fig. 5 replicate the analysis for the second control group, i.e. transactions in a 500–3000 m buffer around the respective renewal area. The table displays the effects of separate regressions for every renewal area. As the renewal areas Soldiner Straße and Kottbusser Damm Ost and thus their respective buffer areas are relatively small and with comparably few real estate transactions, we have only a limited amount of observations and have to omit these areas due to lack of degrees of freedom. Generally, the effects from this robustness exercise point into a similar direction as the results from Table 3. This indicates that the investigation areas are indeed an appropriate control group.

Our findings are less favorable than the findings of some other studies, for example the study of Richmond, USA (Rossi-Hansberg et al., 2010). A first difference may be found in the target of the two programs. Typically, the population in Berlin (consisting of some 85% tenants) is shy against revaluations. Any Berlin renewal policy thus faces a trade-off between renewing and limiting price increases. Second, in most renewal Berlin areas landlords are absent, inducing them to spend less on maintenance than owner-occupiers (Galster, 1983). Similarly, owner-occupiers have been demonstrated to invest more in social capital (DiPasquale & Glaeser,

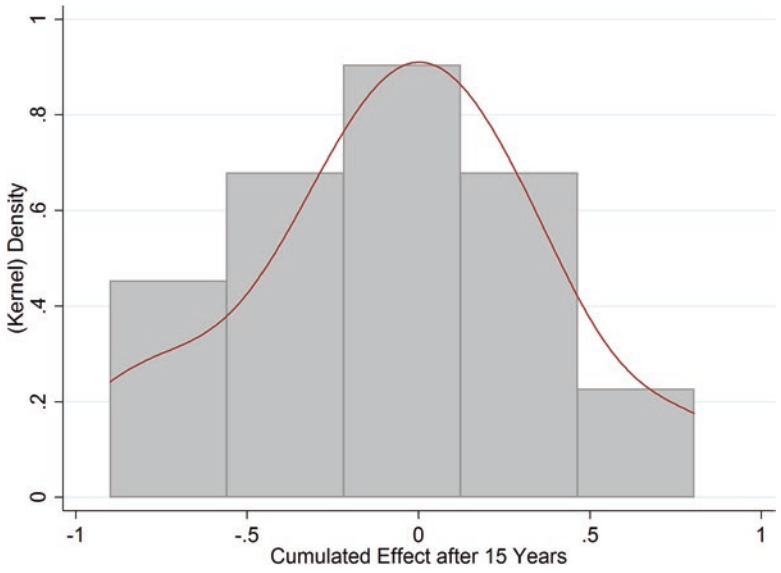

Fig. 3 Cumulated areas specific effects after 15 years. Graphs show the distribution of cumulated treatment effects by areas. The bars plot the frequency of occurring cumulated effects. The *red lines* plot the kernel density using a Gaussian kernel

Table 4 Renewal area effects: 500–3000 m buffer

Area	Cumulated change (%)	Appreciation rate (%)	Coefficient	t-statistic	Observations (Subsample)
Helmholtzplatz	40.32	2.688	0.339	0.909	521
Spandauer Vorstadt	121.36	8.091	0.795***	4.968	609
Kollwitzplatz	74.84	4.989	0.559***	2.773	588
Samariterviertel	−11.96	−0.797	−0.127	−0.504	483
Altstadt Kiez Vorstadt	−12.70	−0.847	−0.136	−1.407	603
Niederschöneweide	−55.24	−3.683	−0.804***	−4.918	503
Teutoburger Platz	81.80	5.453	0.598	1.250	584
Winsstrasse	56.27	3.751	0.446***	2.796	414
Warschauer Strasse	2.40	0.160	0.024	0.108	548
Komponistenviertel	0.12	0.008	0.001	0.006	552
Traveplatz Ostkreuz	44.00	2.933	0.365**	2.503	484
Wollankstrasse	27.09	1.806	0.240*	1.826	709
Beusselstrasse	−27.12	−1.808	−0.316**	−2.704	453
Rosenthaler Vorstadt	359.54	23.969	1.525***	5.501	575
Kaskelstrasse	3.97	0.265	0.039	0.362	413
Weitlingstrasse	−17.77	−1.185	−0.196	−1.680	462
Wederstrasse	−40.02	−2.668	−0.511*	−1.934	591
Boetzowstrasse	25.81	1.721	0.230*	1.766	374
Oberschöneweide	−6.49	−0.433	−0.067	−0.300	546
Stephankiez	23.58	1.572	0.212**	2.340	477
Soldiner Strasse	–	–	–	–	–
Kottbusser Damm Ost	–	–	–	–	–
Average	34.490	2.299	–	–	524

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$. We only report the cumulated level shift after 15 years, usual controls are included. The last column displays the number of observations included in each regression, including treatment and control group. Due to lack of treated observations, we exclude the renewal areas 21 and 22

1999; Hilber, 2010) and tend to use neighborhood policies as a framework to coordinate their behavior to internalize externalities. As such, they may also be more receptive to renovation subsidies. Also, the Richmond program was based more on community volunteering and local nonprofit organizations, while Berlin adopted a top-down approach implemented by official state authorities. A within-neighborhood contagion effect (Towe & Lawley, 2013) in renovation activity is, thus, less likely in Berlin. Finally, the Richmond program was much smaller—some $14 m; the large discrepancy in the findings for Richmond and Berlin may be explained by the law of diminishing returns.

Our results are in line with other previous analyses that have found moderate and ambiguous effects of similar renewal policies (Ding et al., 2000; Santiago et al., 2001), suggesting that the very positive policy effect found by RH are likely specific to the case of Richmond, Virginia.

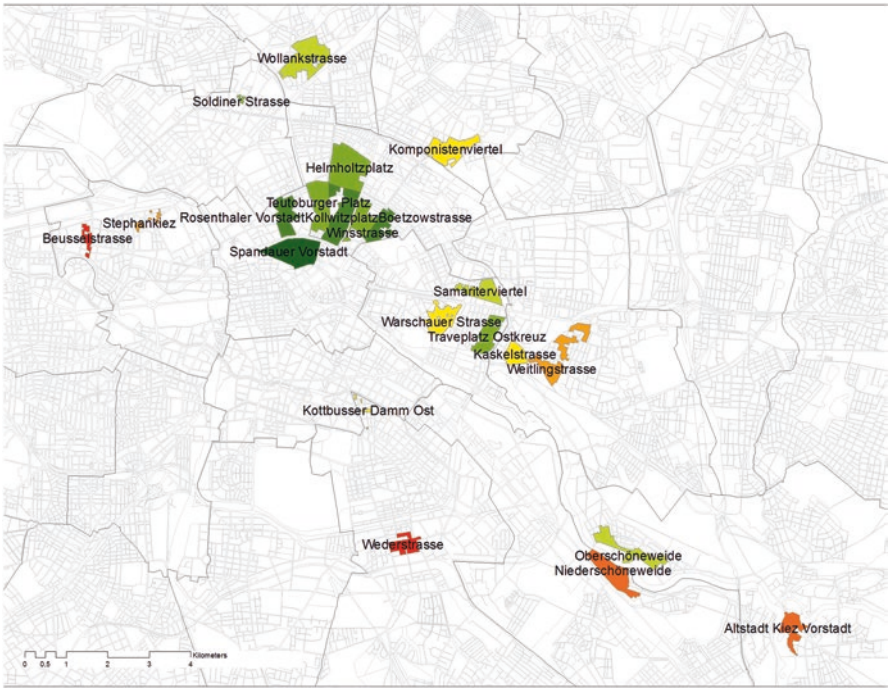

Fig. 4 Renewal winners and losers. Own illustration based on the urban and environmental information system (Senatsverwaltung für Stadtentwicklung Berlin, 2006). The transition from green over yellow to red reflects the transition from large positive, over neutral, to strong negative price effects

Concerning the heterogeneity of the renewal effects on wealth among the renewal areas, it is apparent that – although the small number of renewal areas in the former west of Berlin complicates a comparison – the renewal areas in the east tend to show larger price impacts. This may be due the different starting (price) levels between east and west. The eastern areas were among the most degenerated prior to the policy measure and were essentially cut off prior to the reunification. It may be possible that we also witness a gentrification or catching-up effect which we cannot separate completely from potential policy effects.

Second, most of the areas with positive price impacts lie within or in direct proximity to the district Mitte. This area comprises the historical, political, scientific, and cultural city center. It is also one of the primary recreational centers. Furthermore, the district is naturally well connected to the transit network and was adjacent to the inner German border. The area is, therefore, a suitable candidate for gentrification. The fact that the response to the policy was particularly large in these areas indicates that renewal policies were particularly successful in areas with attractive fundamental location factors (e.g. accessibility, natural or cultural amenities), and less so in

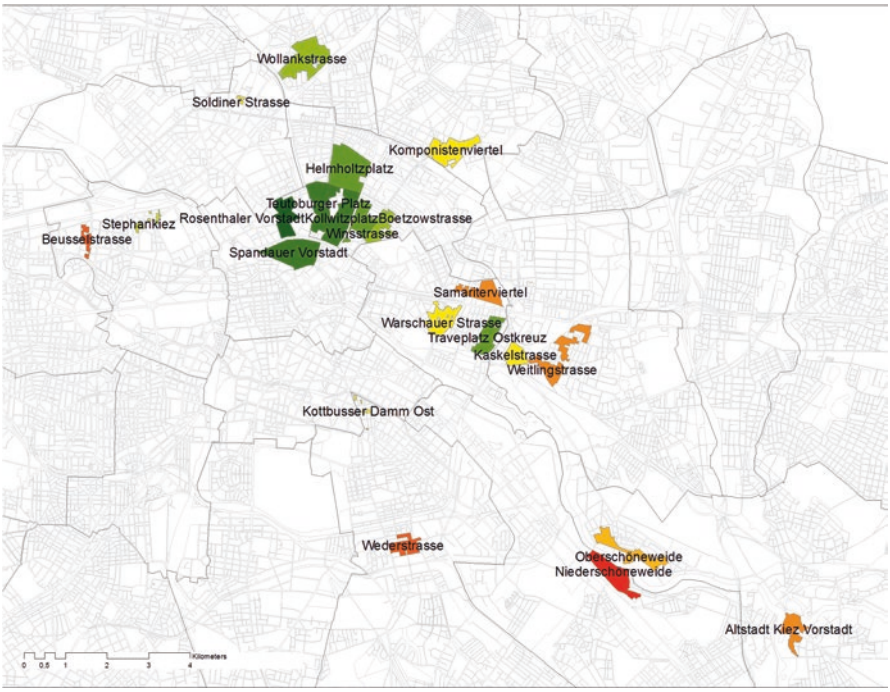

Fig. 5 Renewal winners and losers. Own illustration based on the urban and environmental information system (Senatsverwaltung für Stadtentwicklung Berlin, 2006). The transition from green over yellow to red reflects the transition from large positive, over neutral, to strong negative price effects

areas that are structurally disadvantaged. Third, the heterogeneity may be due the different ambitions and qualities of the local population as well as the responsible local managers of the different renewal areas.

5 Conclusion

Urban renewal programs have become widely used policy measures to address urban development. Quite a few ex-post studies exist which aim to evaluate the aggregated effects of such policies on target areas. Less is known, however, about the reasons why certain areas are more/less responsive to external stimuli.

With this study, we addressed some of these issues. We analyzed an urban renewal program in Berlin, Germany, with 22 designated renewal zones between 1990 and 2012. Renovations/buildings upgrades in these zones were eligible for public funding through tax abatements, subsidies, and other financial support. Additionally, the public space in these areas was substantially upgraded. This includes the building of roads and squares, schools, playgrounds, and sanitary improvements.

We separately estimated the effects of the renewal policy on property prices for each respective redevelopment area by comparing price developments in these areas to two control groups. The first control group consisted of areas deemed suitable as urban renewal areas, which were ultimately not designated. The second control group was a straight forward geographical restriction: we compared price developments in the renewal areas to all transactions in a 500–3000 m buffer around the respective renewal area.

We found a considerable amount of treatment heterogeneity. While for some renewal areas the assessment in this evaluation was positive, there were specifications in several areas which developed quite differently and ended up with a decrease in policy prices due to the urban renewal policy. Graphical analysis showed that the strongest price increases occurred in the most central areas in the former eastern part of Berlin. As these areas were among the most degenerated prior to the policy measure, it is possible that the policy was most effective in these areas. However, as these areas were essentially cut off prior to the reunification, we could have witnesses a gentrification or catching-up effect which we cannot separate completely from potential policy effects.

To obtain a deeper understanding of the reasons for this heterogeneity in responsiveness to the policy, an even more concentrated qualitative approach would be necessary. It is, however, safe so say, that a one-fits-all solution seems not appropriate for a policy topic which includes such a complex mix of incentives and socio-demographic structures as urban redevelopment. Until we have a better understanding of why certain areas underperform so drastically compared to the average, a careful individual assessment of the policy targets and involved stakeholders seems necessary.

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Land Use Regulations and Fertility Rates

Daniel Shoag and Lauren Russell

Abstract Previous literature has shown that land use regulations influence where people choose to live within the United States by impacting housing prices. In this chapter, we study the impact of these same regulations on another component of population growth-fertility rates. First, we employ a dataset on the stringency of land restrictions using court based measures created by Ganong and Shoag (Why has regional income divergence in the U.S. declined?. *Journal of Urban Economics*, in press). We add to this separate cross-sectional measures of land use regulations from the American Institute of Planners, the Wharton Urban Decentralization Project survey, and the Wharton Residential Land Use Regulation Index (WRLURI). Combining this data with fertility data from the CDC and the Survey of Epidemiology and End Results data, we explore the impact of land use regulations on fertility at both the state and county level. We find a significant negative relationship between land use restrictions and fertility rates across all measures and geographies. Specifically, we find that land use regulations reduce fertility rates for teens and women in their 20's while increasing the fertility rate for women in their 30's or older to a lesser degree.

1 Introduction

Economists have long known that housing supply is an essential contributor to population growth at the metropolitan level. Glaeser, Gyourko, and Saks (2005a, 2005b) show that there is an extremely tight link between MSA level growth in population and housing stocks, and Glaeser and Tobio (2008) show that much of the growth in population in the sunbelt can be credited to expansions in housing supply. The argument is intuitive; in order for regions to grow, there must be sufficient affordable housing to accommodate the new population.

Many factors contribute to the variation in the costs of supplying housing across markets. Gyourko and Saiz (2006) link differences in construction costs with differences

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in unionization rates and wages. Saiz (2010) documents the importance of geography—such as steep slopes and water bodies—in determining the elasticity of housing supply at the metro level. Finally, capital costs also vary across places and contribute to differences in the costs of supply (Hwang & Quigley, 2006).

Though housing costs are determined by all of these factors, variation in these costs generally cannot account for the wide distribution of housing prices across the United States. Glaeser and Gyourko (2017) note that structure costs per square foot for a modest quality home have an interquartile range of $72–$86 across metro areas. This cannot account for the significantly greater variation observed in home prices. For example, industry groups report differences in prices per square foot ranging from $24 in Detroit to $810 in San Francisco.[1] Additionally, this variation cannot explain the rise in real house prices above these costs (Davis & Heathcote, 2004; Davis & Palumbo, 2008). For example, Gyourko and Molloy (2015) show that real construction costs are roughly unchanged since 1980, while real housing prices have nearly doubled.

This increase in variation and markup over construction has largely been attributed to increases in the stringency of land use regulation. Gyourko, Mayer, and Sinai (2013) document the "ever widening gap in the price of housing between the most expensive metropolitan areas and the average ones," and note the role of inelastic housing supply. Quigley and Raphael (2005) show an explicit link between regulation and house price increases across cities in California. Glaeser, Gyourko, and Saks (2005a, 2005b) show the same link in Manhattan. Less directly, Raven Saks (2008) shows that cities that have labor markets with tighter regulation develop less housing and see higher house price increases in response to labor demand shocks.

Though zoning and other land use restrictions have existed for at least one hundred years, with New York City instituting one of the first citywide zoning laws in 1916, significant changes beginning in the 1970s have magnified their impact. Fischel (2004) traces these changes to the emergence of new transportation options (e.g. highways), racial desegregation, and an increasing focus on environmentalism. These forces, Fischel observes, led to "regional governance arrangements that began to be formed in the 1970s" that created an effective "double veto" system in many parts of the country (Fischel, 1989; Popper, 1988). Developers, for the first time, had to win approval from both local and regional authorities, a process described as "The Quiet Revolution" by Bosselman and Callies (1971). As Fischel (2004) writes, the net impact of this new process "changed metropolitan development patterns after 1970."

The regionalism of the Quiet Revolution manifested itself in the courts as well. The textbook *The American Land Planning Law* (Taylor & Williams, 2009) writes that, following the period in the 1900s where courts upheld the application of restrictions to particular tracts of land to be invalid, the courts in the 1970s and later "went to the other extreme, tending to uphold anything for which there was anything to be said." Perhaps the defining case marking this transition was brought

[1] http://www.foxnews.com/real-estate/2016/10/21/what-is-average-price-per-square-foot-for-home-and-why-does-it-matter.html

against the Philadelphia suburb of Mount Laurel, New Jersey. The largely single-family home community put in place onerous restrictions on multi-family units. The National Association for the Advancement of Colored People (NAACP) sued in 1975. The New Jersey Supreme Court ruled in its favor, finding that each community had to provide its "fair share" of "low- and moderate-income housing."

While the NAACP won the case, suburbs interested in restricting development won the war. Mount Laurel's compliance with the ruling involved only trivial concessions, and another state supreme court ruling (Oakwood at Madison) undid the minor protections Mount Laurel provided. The changes taking place in New Jersey were mirrored around the country. These court decisions were instrumental for effecting the regionally focused change described by Fischel, a fact emphasized by Ellickson (1977).

The rise in land use regulation since the 1970s has been linked to changes in population growth in Ganong and Shoag (in press). In that paper, Ganong and Shoag show that historically the population grew most quickly in the richest parts of the country, a process they label "directed migration." Ganong and Shoag show that this process effectively came to an end when high income places embraced regulations that stifled development.

While Ganong and Shoag (in press) focused on migration, land use restrictions may affect population growth through other channels as well. Higher housing prices or increased transportation costs (Shoag & Muehlegger, 2015) could lead people to delay having children or have fewer children altogether. To our knowledge, this relationship has not previously been explored in the data.

In this chapter, we establish that measures of land use restrictions are tightly correlated with lower fertility rates. This is true across a wide range of data sources and geographies, and this relationship remains strong in multiple demanding specifications. While it is impossible to rule out confounding factors entirely, the strong relationship suggests that land use restrictions may affect regional population growth through fertility changes as well.

The remainder of the chapter proceeds as follows. In Sect. 2, we describe the data sources. In Sects. 3 and 4, we discuss the results at both the state and county level. Finally, in Sect. 5 we conclude.

2 Data Sources

To document the link between fertility and land use restrictions, we make use of several data sets to create multiple measures of these regulations. This is important because these laws vary considerably in their details and enforcement. Moreover, individual metrics are often based on noisy survey measures or fail to cover important geographic or regulatory areas. Therefore, it is important to establish that the relationship between fertility and land use restrictions is consistent across different measures and at different levels of geography.

Our primary measures are collected from Ganong and Shoag (in press). These measures are based on the number of cases in state supreme and appellate court databases containing the terms such as "land use" or "zoning." Since the raw number of cases will be influenced by the volume of total cases, we scale these numbers in two ways. In our primary approach, we divide the total count of cases to date mentioning land use by the total number of cases to date in the database. This is a cumulative measure beginning with 1940—the first year for which we have data. We believe that a cumulative measure is preferable because it captures the impact of earlier regulations. As a robustness test, we also construct a measure of the annual count divided by the total number of cases contained in the state court database for that year. We explore both in the tables.

The central advantage of these court-based measures is twofold. First, they are omnibus measures that capture a wide range of restrictions. Intuitively, it is likely that any binding limit will at some point generate litigation and hence contribute to the data set. This has an advantage over survey based approaches, which only focus on a subset of narrowly pre-defined policies. The second major advantage is that these data vary both across space and time. To our knowledge, these data represent the first national panel measure capturing land use restrictions.

To assess whether the relationships using these measures are robust, we introduce three alternate cross-sectional sources. While they do not provide variation over time like the court-based measures, they do supply a useful robustness check.

The first measure comes from the 1975 survey by the American Institute of Planners. These data were aggregated to a state level index following the procedure described in Ganong and Shoag (in press). Our second measure comes from the Wharton Urban Decentralization Project survey, conducted in 1989. We summed the questions on the sufficiency of zoned residential land (graded on a 5-point scale), and then aggregated the metro level data weighting by population. Our final measure is the Wharton Residential Land Use Regulation Index (WRLURI) constructed by Gyourko, Saiz, and Summers (2008) and aggregated similarly.

Finally, we measure fertility rates using data from the CDC and the Survey of Epidemiology and End Results data hosted by the National Bureau of Economic Research. Following the literature, we define fertility rates as the number of live births per 1000 women ages 15–44. The distribution of fertility rates across states in 2015 is plotted in Fig. 1.

3 State Level Results

We begin our analysis at the state level by exploring cross-sectional correlations. As Figs. 2, 3, 4 show, each of the purely cross-sectional state-level measures is strongly negatively correlated with fertility rates. Although the measures are constructed using independent and unrelated surveys spanning across three decades, this negative correlation holds firm.

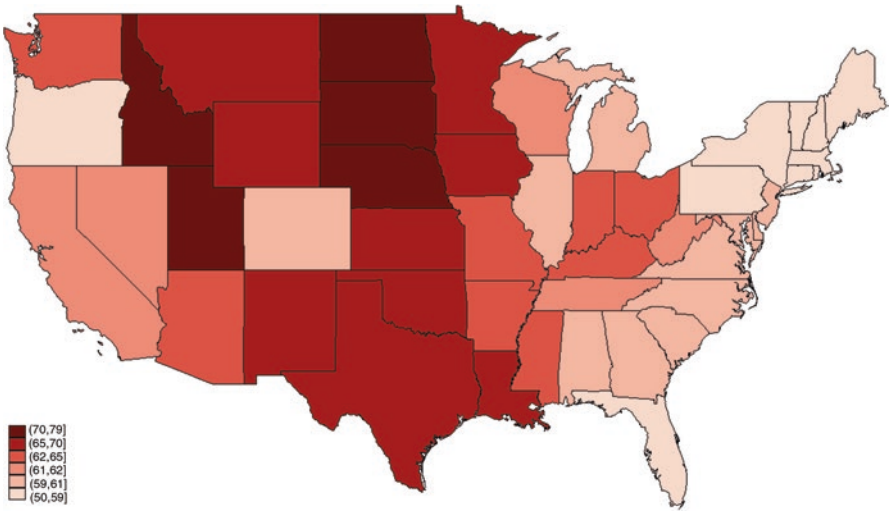

Fig. 1 Fertility Rates (live births per 1000 women ages 15–44) across U.S. states in 2015

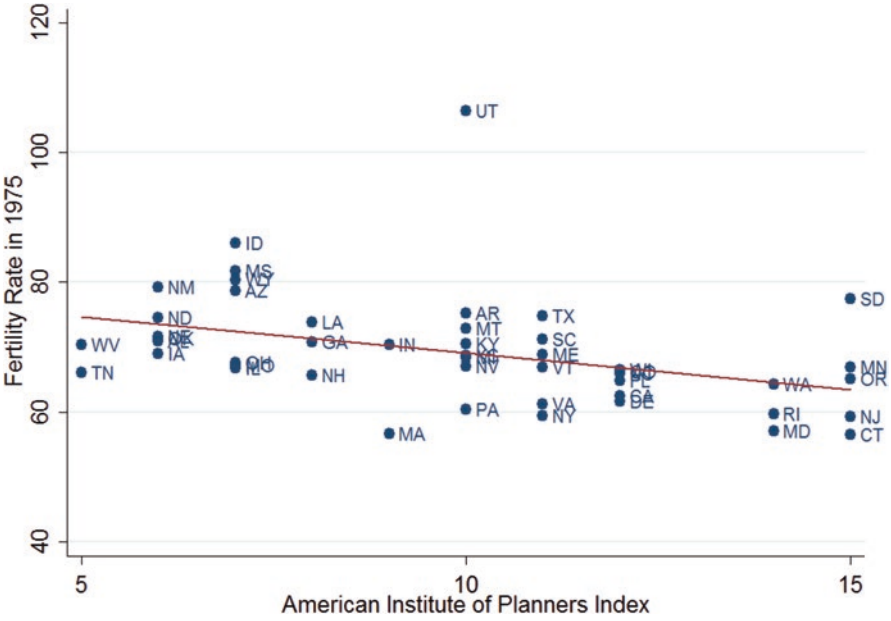

Fig. 2 Correlation of Fertility Rates and a Land Use Regulation Index constructed from the American Institute of Planners data in 1976

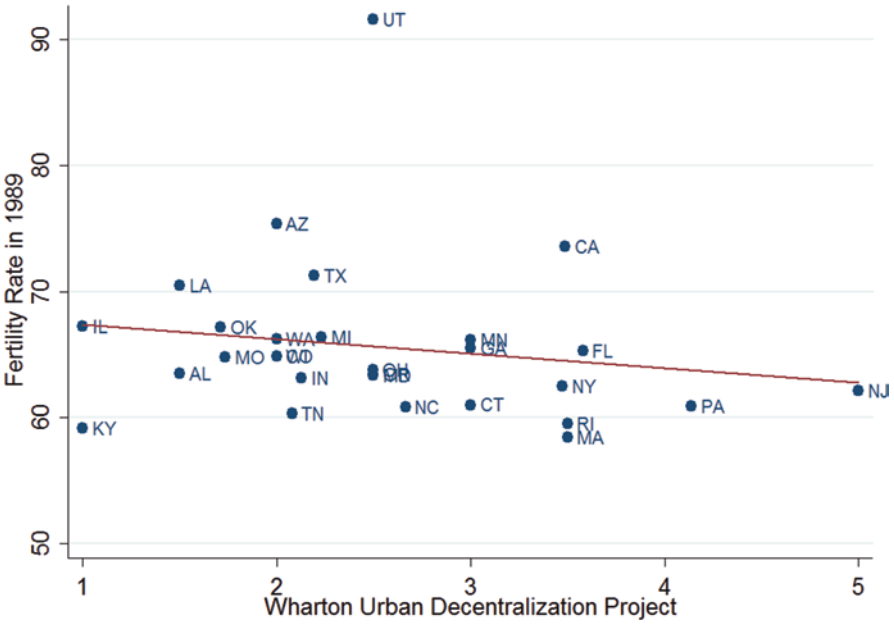

Fig. 3 Correlation of Fertility Rates and a Land Use Regulation Index constructed from the Wharton Urban Decentralization Project data in 1989

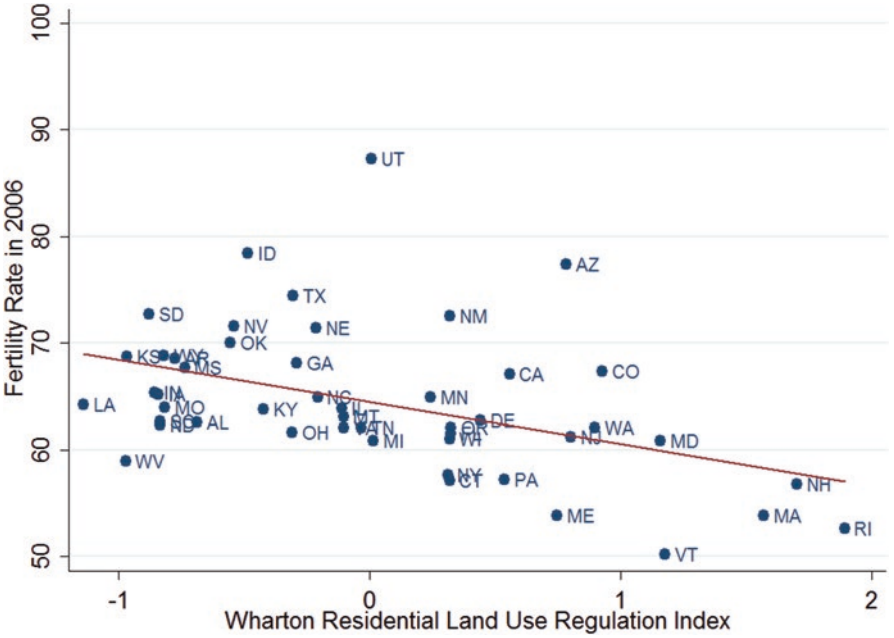

Fig. 4 Correlation of fertility rates and the Wharton residential land use regulation index data in 2006

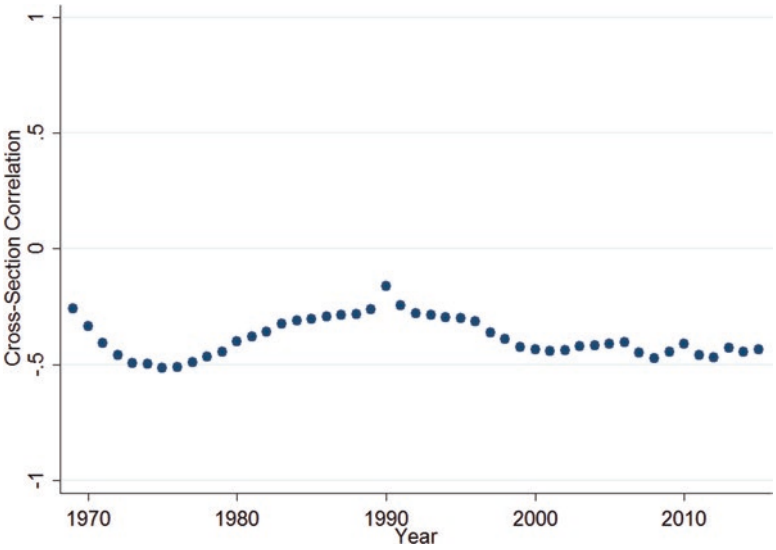

Fig. 5 Annual cross-section correlation of fertility rates and court based cumulative "land use" regulation measure over time

In Fig. 5, we plot the annual cross-sectional relationship between the cumulative "land use" court based measure and fertility rates across states. As is evident in the graph, the relationship is quite strong in virtually every year.

However, it is reasonable to think that this cross-sectional relationship could be confounded by fixed differences across states. To address this issue, we turn to regression models that exploit the changes within a state over time in the stringency of land use restrictions. We operationalize this with a fixed effects model in which we control for both state and year fixed effects and regress state annual fertility rates on our land use restrictions measures. The state fixed effects control for unchanging differences across metro areas, and the year fixed effects absorb common trends over time. The negative relationship between fertility and land use remains strong for all of the court-based measures after these controls. While the magnitudes may be hard to parse from the table, the cumulative measures imply that a one standard deviation increase in the land use measure is associated with a 0.14–0.38 standard deviation decrease in fertility rates (Table 1).

However, even after controlling for state and year fixed effects, the potential for omitted variable bias or misspecification remains. In Table 2, we address this issue by adding state-specific linear time trends and Census Division-year fixed effects. The state-specific trends, used in Columns 1–2, absorb any constant state specific trend. The Census Division-year fixed effects absorb any non-linear pattern that would apply regionally. The coefficients on the land use measures are virtually unchanged by these additional controls. The constancy of the relationship suggests that this robust pattern may not be purely spurious.

Of course, a state level analysis makes use of only very coarse geographic variation. To study the question at more refined levels, we turn to county level data in the next section.

Table 1 Robust standard errors in parentheses. All specifications include state and year fixed effects

	(1)	(2)	(3)	(4)
Variables	State Annual Fertility Rate (Live Births per 1000 women ages 15–44)			
Cumulative:				
"Land Use" Cases/Total Cases	−313.4***			
	(32.3)			
"Zoning" Cases/Total Cases		−190.0***		
		(16.4)		
Annual:				
"Land Use" Cases/Total Cases			−35.7***	
			(13.8)	
"Zoning" Cases/Total Cases				−16.0**
				(6.3)
Observations	2256	2256	2016	2016
R-squared	0.84	0.85	0.84	0.84

*p<0.1, **p<0.05, ***p<0.01

Table 2

	(1)	(2)	(3)	(4)
Variables	State Annual Fertility Rate (Live Births per 1000 women ages 15–44)			
Cumulative:				
"Land Use" Cases/ Total Cases	−323.3***		−373.1***	
	(59.2)		(44.0)	
"Zoning" Cases/ Total Cases		−177.1***		−178.1***
		(21.4)		(13.3)
Additional Controls	State specific time trends		Census Division-Year Fixed Effects	
Observations	2256	2256	2016	2016
R-squared	0.84	0.85	0.84	0.84

Robust standard errors in parentheses. All specifications include state and year fixed effects.
*p<0.1, **p<0.05, ***p<0.01

4 County Level Results

To explore this question at sub-state geographies, we matched county level fertility rates to the Wharton Residential Land Use Regulation Index (WRLURI). We use the county decomposition of this series outlined in Ganong and Shoag (in press).

Neither the CDC Wonder database nor the WRLURI is comprehensive. In total, we were able to match 425 counties comprising 200 million people in the year 2006. As discussed above, we do not have sub-state data that varies over time, and so our county results exploit only cross-sectional variation.

We began our investigation by regressing county level birth rates on the Wharton index, both weighted and un-weighted, as reported in Table 3. The data show a strong negative relationship that is statistically significant. The Wharton index has a standard deviation of roughly 0.77 in this sample and a mean of roughly zero. Fertility rates have a mean of 65.4 and a standard deviation of 10.3 at the county level. The magnitude of the raw relationship implies that a one standard deviation increase in land use regulation is associated with a 0.18 standard deviation change in birth rates. Alternatively, a one standard deviation increase in the WRLURI is associated with 1.8 fewer births per year per 1000 women.

Again, we are aware that this relationship may be confounded by outside factors. To address this possibility, we add control variables in column 3. Specifically we add controls for the share of the population with a college degree and the average per capita income in the county. The addition of these controls lowers the coefficient, but the impact of land use regulations remains significant and important.

Finally, in column 4, we explore the importance of confounding factors by adding fixed effects for labor market areas (Tolbert & Sizer, 1996). These dummy variables absorb any variation across labor markets and estimate the impact by comparing counties within a given labor market area. The results are less precisely estimated but extremely similar in size to the baseline county-level estimates. Moreover, they remain statistically significant at the 10% level.

Though the data do not permit a natural experiment, the relative constancy of the result across specifications suggests that there may be some causal relationship. Intuitively, markets where housing supply is limited may causally restrict fertility in addition to migration.

To investigate the mechanism further, we collected county-level data on fertility by race and by age of the mother. The CDC data report race only in crude buckets. To ensure sufficient data, we focus only on CDC reported black or African American

Table 3

Variables	(1)	(2)	(3)	(4)
	County Annual Fertility Rate in 2006 (Live Births per 1000 women ages 15–44)			
WRLURI	−2.36***	−2.96***	−1.68***	−2.63*
	(0.56)	(0.75)	(0.56)	(1.47)
Specification	–	Weighted by Population	Controls for Per Cap Income Share BA	Labor Market Area Fixed Effects
Observations	425	425	425	425
R-squared	0.03	0.04	0.09	0.77

Robust standard errors in parentheses
*p<0.1, **p<0.05, ***p<0.01

Table 4

Variables	(1) County Annual Fertility Rate in 2006 (Live Births per 1000 women in age bin)
WRLURI (teen baseline)	−7.48***
	(1.00)
WRLURI × Women Age 20–29	−1.94
	(1.567)
WRLURI × Women Age 30+	13.23***
	(1.10)
Observations	2550
R-squared	0.83

Data comprise six 5-year age brackets from 15 to 44 for each county. Fixed effects for each bracket included. Robust standard errors in parentheses.
*p<0.1, **p<0.05, ***p<0.01

and white fertility rates. The results, not reported here, show that the impact of land use restrictions appears comparable across groups. Though mean fertility rates differ, the data cannot reject the hypothesis that the two groups are identically impacted.

Finally, in Table 4, we break out the impact of land use restrictions on fertility by age. The fertility rates are now defined as the number of live births to women in 5-year age brackets. We control for each age bracket and then estimate the impact of land use restrictions on fertility rates for teens, women in their 20's, and women ages 30 and above. We find that, as before, tighter land use restrictions are associated with lower fertility rates for teens and women in their 20's. In fact, the impact is significantly larger than the general impact—a reduction of 5.8 births per year per 1000 women for teens and 7.2 for women in their 20's.

This large negative impact is partially balanced by a positive effect on women ages 30 and above. Tighter land use regulations actually increase fertility for this group, as can be seen by summing the interaction coefficient with the un-interacted on WRLURI in the above table. This seemingly puzzling result can be reconciled by noting that land use restrictions and expensive housing may cause families to delay having children. This would increase the fertility rate for older mothers, while at the same time reducing overall fertility, as we observe in the data.

5 Conclusion

While it is impossible to definitively trace a causal link between land use restriction and fertility, the results here suggest that the two are strongly related in the data. This is an important finding because it suggests that migration does not capture the full impact of zoning and land use regulation on metro-level population growth. By providing some of the first evidence of the impact of land use restrictions on fertility, we hope to spur further research on this topic and on the potential long run consequences of this mechanism.

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The Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA) and its Impact on Property and Zoning in Germany

Fabian Thiel

Abstract The European Commission hopes that the Comprehensive Economic and Trade Agreement with Canada (CETA) will result in increasing wealth, more competitiveness, and hundreds of thousands of new jobs. There are also plans to harmonize standards and to introduce or monitor new regulations and norms that go beyond the existing member-state legal framework and are to be safeguarded by means of regulatory collaboration and legal supervision. The debate on CETA has not yet reached planning law, construction law, or procurement law in practice. Land as immovable property is mentioned explicitly as an investment asset, and land policy is the "blind spot" in foreign investment treaties. This chapter analyzes the current dynamics for the comprehensive land policy structure in Germany. In this paper, the purpose and proportionality test of CETA—from the constitutional and national spheres down to the municipal level—will comprise of the criteria of fairness, legitimacy, the balancing of investors' expectations, and states' regulatory measures. This chapter explains why the standards and provisions of CETA potentially conflict with the constitutionally guaranteed principle of local self-governance in land policy. The democratic legitimacy of foreign investment treaties regarding real estate remains to be verified, since the controversial relation and distinction between lawful regulation, the fair and equitable treatment standard, and indirect expropriation, lack substantial empirical evidence.

1 Introduction: CETA and Land Policy—The "Blind Spot" in International Investment Treaties

"Globalization is critical for the future of the cities, but it offers no single blueprint for their physical and interpersonal structuring" (Lehavi, 2016, p. ix). On October 30, 2016, the Comprehensive Economic and Trade Agreement (CETA) between the

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EU and Canada reached its first milestone. The (still controversial) draft text of the treaty was signed by the EU Commission and Canadian Prime Minister Justin Trudeau. In a press release, afterward, it was stated that CETA creates new opportunities for trade and investment for Europeans and Canadians, and that its outcome reflects the strength and depth of the EU-Canada relationship. The right to regulate, regulatory cooperation (with the objective of achieving better quality of regulation), and more efficient use of administrative resources are important underlying instruments of CETA. Investment protection is the largest chapter of the CETA treaty (albeit in preliminary status) and is comprised of nine sub-chapters. According to the EU Commission, "it lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court" (EU Commission, 2016). CETA will introduce the following new arenas for land policies of the host states, with the EU Commission as the driving belt (EU Commission, 2016):

- *Protection of legitimate investment-backed expectations*, particularly of intellectual property, movable, and immovable property.
- *Disclosure of "manifestly excessive measures"* against investors, e.g., through planning decisions, the withdrawal of building permits, the termination of land use concessions, and land leases for housing and infrastructure such as public transport systems.
- *Expropriation or measures having an equivalent expropriatory effect*: indirect, but also de facto (so called "creeping") expropriation, or measures tantamount to indirect expropriations.
- *New procedures and standards*, e.g. for public procurement law in the planning and construction sector and for public bidding procedures related to brownfields that are no longer needed to fulfill public tasks—i.e. land, property, and valuation policy tasks.

As mentioned above, CETA is by far not the only instrument that aims to protect the security of investments and standards. It is, until now, the only one that *incorporates international law rules* for all contracting states in Europe and Canada. CETA also raises fundamental questions of constitutional and property law in the member states such as Germany. The partnership creates a legal order that is autonomous in relation to domestic law, its legislative production processes, and their legitimacy. The treaty is unique due to its binding nature, especially the obligation to decisions made by dispute settlement tribunals, together with the possibility to avoid interventions of national governments if the contracting partners agree. Germany is of particular interest for recent developments in international investment protection and arbitration.

CETA was considered as the blueprint and "investment sibling" for the Transatlantic Trade and Investment Partnership (TTIP). Comparable to the U.S. model treaty 2012, CETA provides for the fair and equitable treatment standard in Sect. D, Chap. 8, Art. 8.12. Hence, it opens the door for damages or compensation for any unfair or non-equitable measure taken by the host state (and restricts the host states right to regulate). In total, CETA will comprise of 30 chapters. In the context of this chapter, Chap. 8

(investment), Chap. 13 (financial services), Chap. 19 (government procurement) and Chap. 21 on regulatory cooperation are of particular interest. In general, each chapter interferes in processes such as public services at national, regional and local levels, the rule of law, customary and EU litigation, and the function of CETA member state parliaments (Flessner, 2015). "Rules" will invent new measures, particularly in sectors such as energy, raw materials, or small and medium-sized enterprises. The treaty will also provide for an arbitration of investment disputes by a multilateral investment tribunal (Sect. F, Art. 8.27-8.29) with an appellate mechanism. It is important to note that the core question—"When, how, or at what point does otherwise valid regulation become, on fact and effect, an expropriation?" (Fortier & Drymer, 2004, p. 327)—cannot be sufficiently answered yet. Originally designed as an extraterritorial and extrajudicial instrument to eliminate or at least minimize trade restrictions and non-tariff barriers, CETA leads to globally horizontal "harmonized" environmental and planning standards with direct implications to local land policies in the contracting states.

2 CETA and Land Policy—The "Blind Spot"

Over the past few decades, the voluminous literature has been dealing extensively with state contracts and the relevance of investment contract arbitration, investment agreements, multi- and regional approaches, the scope of application of treaties such as NAFTA, WTO, and Bilateral Investment Treaties (BITs), and the liberalization of the international movement of capital (Bungenberg, Griebel, Hobe, & Reinisch, 2015; Krajewski, 2014, 2015a; Thiel, 2016). Concerning EU investment agreements, one of the main strands in the literature is anchored in the debate over the "right to regulate" investment protection that a host state owes foreign nationals on its territory, and—in the context of CETA—over the core element of investor-state dispute settlement (Costamagna, 2015; Crema, 2013; Flessner, 2015; Krajewski, 2015a, 2015b). These developments certainly influence future investment treaties. Given the fact that some investment dispute cases deal with land and commodities as immovable properties, there is very little academic material targeted analysis of the consequences of the investment standards such as indirect expropriation, fair and equitable treatment, full protection and security, and non-discrimination for the built environment and underlying land policies in the contracting states.

However, the debate was—and still is—mainly dominated by legal scholars rather than by planners, architects or civil engineers. As a rare example for the discourse on the consequences for the real estate markets in the signing member states of "mega-regional" investment treaties such as CETA, TTIP (currently in *statu nascendi*), Trans-Pacific Partnership (TPP), and some housing activists in Germany, Spain and Portugal fear that the protection of transnational investor rights might affect local policies by housing stocks owned by financial funds or joint stock companies with international shareholders (Thiel, 2016). In recent times, critical scholars argue that any limitation of the commercial exploitation of property by new planning regulations, as well as the implementation of rules that determine the limits and scope of

property or introduction of "tenant-friendly" laws, lead to a violation of investors' property rights. The infringement of the fair and equitable treatment standard might be the consequence, leading to deep effects on local urban development and master planning (Costamagna, 2015; Krajewski, 2015a; Lehavi, 2013; Thiel, 2015, 2016).

The underlying argument is this: transatlantic companies which have bought immovable property within a development area could claim a violation of investment security if the city council later decides to reduce the commercial building density by down-zoning. The same applies if the authority changes planning law regulations, decides on a non-renewal of permits, intensifies environmental regulations or imposes land thrift goals to prevent the loss of fertile agriculture land. The German land policy is mostly based on fundamental guiding principles and follows clearly defined, universal and country, region, or group-specific valid objectives as well (see Fig. 1). Its target conflicts are to be made public and a bundle of far-reaching, non-contradictory land policy instruments are developed from them.

The concept is understood as a conscious decision to bring about a sustainable use of land (allocation) as well as of a socially just distribution of landownership and income (Davy, 2012; Dieterich, Dransfeld, & Voß, 1993; Magel et al., 2016; Thiel, 2011). Above all, it involves the statutory and judicial structuring of title or ownership to land as a prime and relatively secure investment. Land and property policy refers to the control of different property arrangements by state measures. In particular, space-related plans and measures shape property policy through municipal building law to the extent that the planning measures relate to land. State mea-

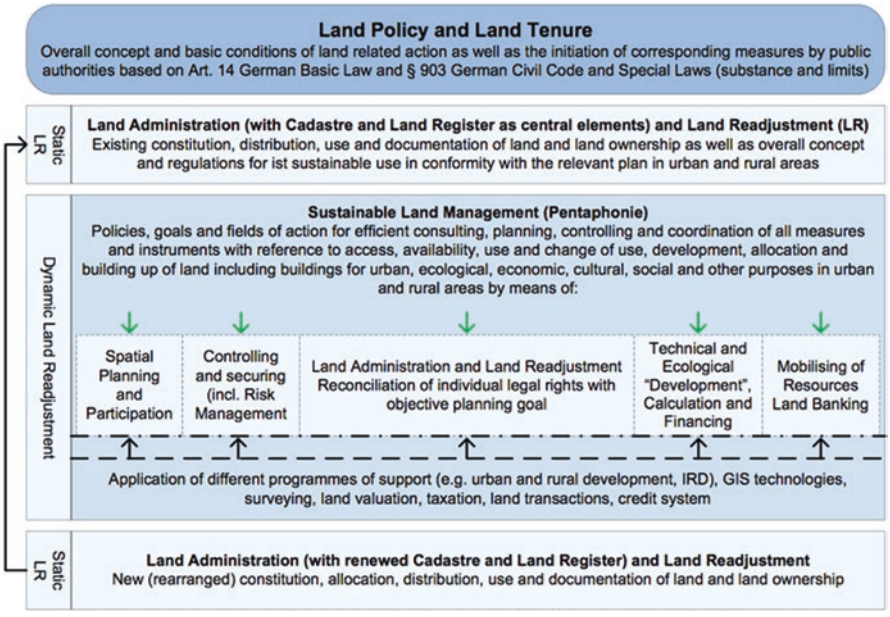

Fig. 1 Context, instruments and legal hierarchy of German land policy (modified from: Magel, Thiel, & Espinoza, 2016)

sures in relation to land management include (i) regional planning and environmental policy objectives, (ii) distribution policy objectives as socio-political and especially social state guidance as a key element of justice, and (iii) personality-related objectives, especially the equality between non-landowners and landowners.

The overarching goal of CETA is investment protection and promotion. Investment protection and promotion consists of the introduction of the concepts of (i) "indirect expropriation" and (ii) "fair and equitable treatment" (FET). Both standards result in regulatory takings by statute and inner-state administrative planning and construction laws. These standards affect land policy. In Germany, indirect expropriation and FET influence environmental, planning and building law represented by the Federal Building Code and the Law against Restrictions on Competition. The aim is to investigate the effects of CETA on the national level (in particular, the German Building Code) and on the local level where—according to the principle of subsidiarity—the regulations of the Federal Building Code are implemented. The purpose of the study is to determine whether CETA, through a dilution of the state's right to regulate and the implementation of the main material investment protection standards, is increasing the profit expectations of investors and driving them to pursue arbitration proceedings as part of an investor-state dispute settlement mechanism. The study further looks at the underestimated effects and risks for the fundamental right of ownership in Article 14 of the German Basic Law, and for the integrity of Germany's planning law and procurement law.

The possible impact of CETA on future land use can be discussed along three trajectories: (i) changes in the type and intensity of land use as a result of different and extended trade and investment flows, such as Foreign Direct Investment or other financial products; (ii) the current impact on existing regulation relevant to land use and land policy; (iii) the impact on such regulation in the future. Most of the impact on current regulation of relevance for sustainable land use and land policy would more likely be through its more cross-cutting and horizontal provisions. Relevant provisions are dispute settlement, regulatory cooperation, and investment protection standards. The screening of policies rightly notes that the scientific evidence on this question is rather anecdotal and case-specific (Bungenberg et al., 2015; Schill, 2010a, 2010b). In other words, the evidence is ultimately not conclusive. All the cross-cutting instruments for regulatory cooperation that the EU envisions to include in CETA—rules on investment protection and regulatory cooperation—have a chilling, or at least weakening effect on *existing* regulation aimed at fostering sustainable land use. Some of the mechanisms slow down regulatory processes or may tilt the political playing field in favor of economic and trade interest, at the expense of sustainable land use and land policies.

3 Investment Protection System as the "Gold Standard" With Influence On Land Policy and Land Use Planning

Core aims of the regulatory quality in international investment law are non-discrimination, fair and equitable treatment, indirect expropriation and the guarantee of investment-backed expectations (Krajewski, 2014, p. 38; Muchlinski, 2008). What is "investment" under CETA? According to the Annex, Pos. A, the scope of the

substantive investment protection provisions includes under the term "investment" (…) any other moveable property, tangible or intangible, or immovable property and related rights" (see: letter h, Annex to Investment Protection). Without a doubt, "land" and the natural resources underneath are considered immovable properties. An "investment" also encompasses any property right such as leases, mortgages, guarantees, liens and pledges, mineral rights, stocks, portfolio shares, stakeholder interests and percentages, revenue sharing, and concessions (see e.g., Art. 1(6&7) of the Energy Charter Treaty). An "Investor" could be any national (individual), an enterprise, but also a legal entity such as the contracting state itself, a private investor or an enterprise from Canada investing in the European real estate sector, and vice versa. However, a legally binding definition of "investment" can be given neither from literature nor from jurisprudence. The term is as ambiguous as the "fair and equitable treatment" standard and the "full protection and security" provision. Questions remain since the current CETA negotiating documents published by the European Commission do not allocate a concluding definition of the term *investment*, and whether all types of investment—direct or indirect, enterprise-based, by contract or cross-border—will be covered by the protection rules under CETA's Chap. 8.

3.1 "Indirect Expropriation"

Numerous international dispute settlement cases, which fall, for example, under NAFTA, the UNCITRAL Arbitration Rules, or BITs, relate to land and real estate. At their core, these cases always relate to the question of whether a certain government act amounts to direct or indirect expropriation, nationalization, or another measure tantamount to an expropriation. CETA also provides for such material investment standards (Chap. 8, Art. 8.12). Under the CETA regime, land and natural resources are not explicitly excluded from investments, either in a negative or positive list. This relates equally to private and public land in the member states of the European Union. In particular, the municipal infrastructure as part of the guarantee of self-government for the municipalities (Art. 28(2) German Basic Law) is to be liberalized further if the negotiating partners get their way. The German Basic Law is silent about the instrument of an "indirect expropriation." The ratchet clause is relevant in this context, which effectively means that privatization becomes irreversible. A return to municipal ownership of land and energy would be rendered impossible. The underlying argument is that nationalization or re-municipalization of energy networks, infrastructure such as suburban trains or municipal housing, is inefficient per se and contravenes the principles of unhindered global investment.

A typical example of a *direct* expropriation is the case when the government takes a factory and the private plot for a public purpose. In contrast, an *indirect* expropriation is vague, if not obscure (Christie, 1962; Lehavi, 2013; Reinisch, 2008; Weston, 1975). Investor-state arbitration as part of any free trade agreement was originally

envisioned for simple cases of direct expropriation. Indirect expropriation,[1] also described as a "regulatory taking" (Alterman, 2010; Kriebaum, 2007; Weston, 1975) has always been a contentious and dynamic topic (Costamagna, 2015; Davy, 2012; Reinisch, 2008; Muchlinski, 2008). Because mass-scale direct expropriation has become uncommon in recent times—notwithstanding the events in Bolivia, Venezuela or Zimbabwe within the last two decades—the focus of the investment protection interest is shifting to indirect expropriation and measures that infringe on fair and equitable treatment. Arbitration court rulings highlight the fact that extending the definition of expropriation, which originally related only to direct cases (cf. Art. 1110 NAFTA), has led to a tension between international investment protection law and the host state's autonomous right to regulate. Leading cases include a "completely non-transparent and unforeseeable" planning permission process that was reversed due to the subsequent designation of a nature reserve according to the decision in the famous *Metalclad* case.[2] Other cases include the refusal of permission for hotel/resort management in Egypt, the prevention of a land development project in Chile (*MTD* case) at the municipal level (due to a breach of a land use plan that had been developed and originally approved at national level), or simply any arbitrary and unreasonable refusal to extend industrial and building permits or to limit a construction right in time.

The question whether direct versus indirect expropriation and "creeping expropriation" occur by manifestly excessive measures is the dominating doctrine in chapters on investment protection and is the nub of the issue (Fortier & Drymer, 2004, 2015). Even after all the years of legal debate, where to draw the line between non-compensable regulation, including the regulation of property rights, compulsory compensable expropriation and temporary taking, is an ever-evolving discussion (Alterman, 2010; Davy, 2012). Indirect expropriations appear in many variations (Escarcena, 2014; Hoffmann, 2008, p. 152). They are flexible, albeit unforeseeable and hard to define. The unanswered questions surrounding them are manifold, especially since attempts to define the demarcation line between indirect expropriation and regulatory measures have frequently been made (Escarcena, 2014), although without much persuasive power. No consent on a consistently used method for compensation of an indirect expropriation has been found (Kantor, 2008; Marboe, 2006); no blueprint has yet emerged.

Conversely, indirect or creeping expropriations have gained popularity in multilateral treaties such as ASEAN, NAFTA, and MERCOSUR, as blueprints for CETA[3] (Crawford, 2012, p. 621; Muchlinski, 2008, pp. 27–29; Reinisch, 2008, pp. 407–458). In the well-reviewed *Metalclad* case, the disappointment of legitimate inves-

[1] Leading, however still disputed cases are: *Hulley Enterprises Limited* (Cyprus) v. *The Russian Federation,* UNCITRAL, PCA Case No. AA 226; *Yukos Universal Limited* (Isle of Man) v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 227 and *Veteran Petroleum Limited* (Cyprus) v. *The Russian Federation*, UNCITRAL, PCA Case No. AA 228 (cited as: "Yukos case").

[2] *Metalclad Corp v. United Mexican States* (NAFTA), Award, 30 August 2000, 5 ICSID Reports 212.

[3] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Greece/Egypt BIT), Award, 12 April 2002, 7 ICSID Reports 178; *Waste Management Inc. v. United Mexican States* (NAFTA), Award, 30 April 2004, 43 ILM 2004, 967.

tor expectations created by the investment host state was causal for the admission of an indirect expropriation. However, the Metalclad project for a landfill had previously complied with all relevant planning regulations and environmental standards. In the *Middle East Cement v. Egypt*, the tribunal found: "When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as 'creeping' or 'indirect' expropriation".[4] In the *Tecmed v. Mexico* case, the tribunal declared the failure to renew the operating permit for a landfill as an indirect expropriation. The interim conclusion is that from the investor's perspective, it is easier to claim indirect expropriation rather than direct expropriation. However, evidence for indirect expropriations is always unclear and open to the tribunal's interpretation.

3.2 "Fair and Equitable Treatment"

Fair and equitable treatment is an emerging and controversial issue in international investment law. It appears prominently in Art. 1105(1) NAFTA, Art. 10(1) Energy Charter Treaty, and in Art. 2(2) of the German Model BIT. As an "embodiment of the rule of law" (Schill, 2010, p. 155), however, arbitral jurisprudence did not manage to develop uniform methodologies for the standard's application. The standard consists of four sub-variations and conditions (Brownlie, 2003; Bungenberg et al., 2015; Crawford, 2012, p. 617; Dolzer, 2002, 2005; Reinisch, 2015a, 2015b; Muchlinski, 2008; Schill, 2010; Vandevelde, 2010; Yannaca-Small, 2008). These are: (i) self-standing standards without reference to international law standards, but entirely conceptualized by arbitral tribunals; (ii) in accordance with international law; (iii) linked to standards of "minimum treatment of aliens" to avoid severe discrimination; (iv) achieve freedom from coercion or harassment, transparency, protection against arbitrariness, and promotion of good faith with express reference to obligations such as unreasonable or discriminatory measures. The FET standard may be violated, even if no *mala fides* is involved.[5]

From a legal perspective, the complexity of substantial regulatory convergence represents a significant lacunae (Dolzer, 2002, p. 5; Kriebaum, 2007, 2008; Schill, 2010). Seeking a definition of the legitimacy and proportionality of investment expectations includes the analysis of fair and equitable treatment of investors before a test of democratic legitimacy. Most importantly, FET is a legal standard (Schreuer, 2006). Real property or planning related decisions affecting the investor shall be traceable to that legal framework according to the signed CETA treaty. While the host state is entitled to determine its legal and economic order—by the hierarchy

[4] *Middle East Cement v. Egypt*, Award, 12 April 2002, paragraph 107.

[5] Relevant jurisdiction can be derived from cases such as *TECMED v. United Mexican States*, Award 29 May 2003; *Occidental v. Ecuador*, Award, 1 July 2004; *Siemens v. Argentina*, Award, 6 February 2007; *Jan de Nul NV v. Egyp*t, Award, 6 November 2008.

and rule of law—the investor has a legitimate expectation in the system´s stability and credibility to facilitate rational planning and decision making. Award and bidding procedures conflict with the fair and equitable treatment. The linkage between land use planning and fair and equitable treatment is obvious in the leading case of *MTD Equity v. Chile*. In this case, the prevention and withdrawal of an urban development project due to the violation of the preparatory land use plan was interpreted as an infringement of the FET standard. The arbitration tribunal involved in the case emphasized that the standard is also violated in cases of passive behavior of the state, i.e. by the denial of adaption of the (preparatory) land use plan according to the requirements and business expectations of the investor and its contributory behavior: "Its terms are framed as a pro-active statement—'to promote', 'create', 'stimulate'—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors", ruled the tribunal in the *MTD* case.[6]

MTD Equity is the landmark case for the development and the Most-Favored Nation (MFN) standard in international investment law. MFN describes the principles of equality and non-discrimination and was subsumed under the fair and equitable treatment standard by the *MTD* tribunal.[7] *MTD* invested in a project for the construction of a residential and commercial complex in Chile. The investing company relied upon the subsequent re-zoning of the selected site in preparation for construction (Caron & Shirlow, 2015). *MTD* filed the application with Chile's Foreign Investment Commission (FIC) with the core information and data on the project. The application was approved by the FIC. The investor's expectations were that the regional authorities would assist/support *MTD* to achieve the necessary re-zoning, but the regional planning administration later exhibited reluctance to complete the re-zoning.[8] The Ministry of Housing and Urban Development informed the investor that it would not initiate any modification to the zoning or allow the project to proceed.[9] The Ministry later formally rejected the project, and FIC declined to intervene in favor of *MTD*. The underlying BIT[10] provided that:

> … Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.

Caron and Shirlow (2015) draw the conclusion that it is clear that the *MTD* proceedings illustrate, and had been influential in developing, the contours of this area of law. The standard is also violated by the non-renewal of business licenses and leasing rights[11] and by newly introduced regulatory and planning instruments and

[6] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (Chile/Malaysia BIT), Final Award 25 May 2004, 12 ICSID Reports 3; see also: *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award 18 July 2014.

[7] *MTD*, Award, § 103.

[8] Ibid., § 64.

[9] Ibid., §§ 72–75.

[10] Malaysia-Chile BIT; signed 11 November 1992, entered into force 4 August 1995.

[11] Leading cases: *Wena Hotels Ltd. v. Arab Republic of Egypt* (United Kingdom/Egypt BIT), Award, 8 December 2000, 6 ICSID Reports 89; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award 17 March 2006.

requirements via legislative and executive branches affecting the economic basis of the enterprise.[12] The termination of investment contracts, building concessions,[13] and the abusive treatment of an investor have tantamount effects similar to the encroachment of the fair and equitable treatment standard. In the often-referenced case *Waste Management v. United Mexican States*,[14] the deciding tribunal found that "… fair and equitable treatment is infringed … if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectorial or racial prejudice … or a complete lack of transparency and candor in an administrative process." Given this general definition, one might call the ambiguous clause of fair and equitable treatment comparable—in investment law terminology—tantamount to "expropriation light" (Hoffmann, 2008; Yannaca-Small, 2008). The line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting. Evidence can be drawn from the interesting *Sempra Energy v. Argentina* case.[15] Indicators such as the protection against discrimination, transparency and stability, legitimate expectations as "the reasonably-to-be-expected economic benefit"[16] or proportionality of state measures show that fair and equitable treatment is an ambiguous clause, if not a mystifying legal term.

4 CETA and the Dynamics of Land Policy in Germany: A Feasible Contradiction in View of the Investment Protection Standards?

German land policy is specifically reflected in tensions between different feasible property arrangements for land use by land management and administration measures (see Fig. 1 above). Land policy is an interdisciplinary approach in order to contribute to a functional transformation of property within a modern planning society. The legal academia primarily attempts to "establish what should be" (Kelsen, 1934, p. 20). However, the ability of the law to exercise control is often questioned in the field of land use planning, although the (constitutional and administrative) law is specified by numerous other instances. The European Commission argues vividly that CETA will advance the principles of fairness, equality, and the balancing

[12] Leading case: *Pope & Talbot v. Canada* (NAFTA), Interim Award, 26 June 2000, 7 ICSID Reports 69.

[13] Leading cases: *Siemens AG v. Argentine Republic* (Germany/Argentina BIT), Award, 6 February 2007; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (United States/Ecuador BIT), Award, 18 August 2008, 15 ICSID Reports 146.

[14] *Waste Management I*, ICSID, Award, paragraph 98.

[15] *Sempra Energy v. Argentine Republic* (US/Argentina BIT), Decision on Jurisdiction, 11 May 2005, paragraphs 300 and 301.

[16] Leading case: *Metalclad Corp v. United Mexican States* (NAFTA), Award, 30 August 2000, 5 ICSID Reports 212, paragraph 103.

of interests in all sectors that are opened for liberalization such as services, goods, and resources. Implications are crystallized in regard to land policy when the objective effects and subjective intentions of a governments' action come under scrutiny. The consistencies and inconsistencies between German constitutional and administrative law in comparison with the investment protection standards—derived from and developed by arbitral jurisprudence—will be analyzed further. Aspects invoked by investment arbitral tribunals as part of fair and equitable treatment and indirect expropriation are the concepts of stability, predictability, consistency of the host state's legal order (principle of rule of law; legal certainty and legal security), and the effectiveness of planning law regulations.

4.1 CETA Implications for Article 14 Basic Law: The "Goes-Too-Far-Regulation" by Effective Land Use Planning Versus the Constitutional Legitimacy of Planning Measures

The German "social model" of property (see Fig. 1) clearly requires landowners to act in a socially responsible manner, as determined by regulations authorized by the legislature. The content and limit of property rights are aimed at a "socially just property order". Under the CETA regime, the social obligations must meet the proportionality test and allow, under certain circumstances, government intervention. Obligations depend on the social importance of the property type that may change over time. The German Basic Law distinguishes two forms of property restrictions (see Fig. 2): the determination of content and limits (Art. 14(1) Sentence 2) and direct expropriation (Art. 14(3)). The domestic system is focused on protecting the self-realization of the owner, rather than an economic standing. Art. 14 of the Basic Law as the "Magna Charta" of German property law is widely examined in international investment law literature with regard to the scope of compensation (Reinisch, 2008; Sabahi & Birch, 2010; Sabahi & Birch, 2010).

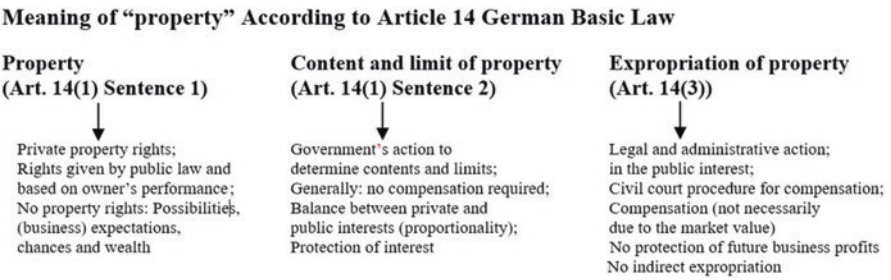

Fig. 2 The "construction of property" according to Article 14 German Basic Law

Although case law derived from the German Federal Constitutional Court has extensively tried to demarcate the realms of paragraphs 1 and 3 of Art. 14 of the German Basic Law, the discussion and interpretation of the problems combined with the norm are anything but solved. This is true in respect to the social and natural functions of non-renewable resources and the legally justified governmental interventions to restrict and—even more essentially—to define private property rights in the public interest. The definition of an "expropriation" is entirely clear, at least on paper. Expropriation means a deprivation of property in an individual case directed at a transfer of property from one person to another in order to achieve an objective of public interest (Thiel, 2011). The Constitution, but also the Federal Building Code, are silent, however, about the term "indirect expropriation". The problem lies within the interpretation of the regulatory measures provided for by Art. 14(1) Sentence 2 (see Fig. 2). It does not say anything about compensation. All general restrictions of property such as regulations of legally binding land use plans, urban restructuring and urban land readjustment imposed by law constitute only a determination of content and limit of property.

The compensation for expropriation according to Art. 14(3) German Basic Law is the result of an act of expropriation, but it is also a balancing factor within the principle of proportionality. Compensation for expropriation and for damages from public planning and building law can be set below market value. A general prescription for any type of compensation is not possible. The compensation surely depends on the motivation and rationalities of the involved parties, i.e. the private landowners and the government. But it is not just the task of the state to guarantee property rights and the inheritance of these rights. Another element of "regulatory quality" is that the state defines and implements underlying legal and institutional conditions. The state has to ensure that the "public good" of the ownership of land shall be used to the maximum possible value for the people of the Federal Republic of Germany. This argument is based on Art. 14(2) German Basic Law: Property Entails Obligations.

"(I)f regulation goes too far it will be recognized as a taking." The quotation is taken from the dissenting vote of Justice Louis Brandeis in the *Pennsylvania Coal v. Mahon* landmark case.[17] Determining when a regulation "goes too far", and will thus be recognized as a taking, is the *nub of the issue* (Alterman, 2010; Crawford, 2012; Fortier & Drymer, 2004, p. 298; Schreuer, 2006; Weston, 1975). According to the CETA document on "rules," the partnership follows an international expropriation trend which leads from direct expropriation towards *indirect*, also called "creeping", or towards ad hoc-expropriation—with its prerequisite of a substantial loss and economic deprivation of the landowner and an erosion of rights associated with landownership by state interferences. Is justice Brandeis still right even under the CETA regime? Will the fair and equitable treatment standard and the indirect expropriation lead to a modified interpretation and legal adoption of Art. 14 of the German Basic Law? Will the treaty change anything in relation to this principle agreed by consensus—regardless of the dispute concerning the "freedom to build" (*Baufreiheit*)

[17] *Pennsylvania Coal v. Mahon*, 260 US 393 (1922).

which is developed under Art. 14 paragraph 1 Sentence 1 of the Basic Law? Does CETA mean the end of the special urban development provisions of the Federal Building Code, or, because of the early warning system (regulatory chill effect), will the instruments be at least more difficult to implement in light of amendments or new rules on social tenancy law?

Accordingly, future regulations on rent controls, preservation, neighborhood protection measures (pursuant to Sect. 172 Federal Building Code), and on business activity of renting platforms of the "sharing economy" such as Airbnb, as well as future bans on conversion and misuse to prevent an upgrade of buildings to luxury status, could all be made at least more cumbersome or disputed since these bans surely affect investment expectations and result in indirect expropriations. For example, international investors that have purchased portfolios of municipal housing or housing company stocks via "share deals," interpret regulations that are disadvantageous to them as a breach of the material investment protection standard of fair and equitable treatment. A clear distinction must be made between administrative and investment due process requirements in case of the revocation and cancellation of buildings and land use concessions, operating licenses, and building permits (see Table 1). A consistent and coherent approach between international investment law and state liability law has not developed yet (Burke-White & Von Staden, 2010). There is a need for public law standards of review in investor-state arbitrations by the Investment Court System as designed in recent rounds of negotiations. Table 1 demonstrates the necessity of "marrying" investment protection procedures, and fair and equitable treatment standards with the domestic—constitutional and administrative—rule of law for an effective land policy. A "clash of norms" can clearly be foreseen since CETA will invent "regulatory coherence." This generally comes in line with new procedures and standards, e.g., for public procurement law in the planning and construction sector and public bidding procedures related to brownfields that are not needed to fulfil public tasks anymore.

4.2 Domestic Planning Law Versus International Investment Law Standards: Non Convergence and Interference of Planning-Driven Land Value Development?

The government may limit and terminate land use plans and building permissions on well-weighed justifications of which lands are being "sacrificed in the public interest," e.g., by paying owners for the "breach of faith" according to Sect. 39 of the Federal Building Code. The German law of state liability for damages caused by planning decisions (Sect. 39-44 Federal Building Code) is well-structured and makes it unlawful for municipalities to cause unacceptable negative impacts on private property by designating it for a public (or even private) use category (*transfer of title claim; "down-zoning"*), thus leading to an indirect expropriation according to Sect. 40 Federal Building Code (Schmidt-Eichstaedt, 2010, pp. 273–274).

Table 1 Zoning and risk—Land use planning and zoning regulations according to the Federal Building Code: tantamount to expropriation, unreasonable interference of property investment and/or prevention of enjoyment?

Regulations and instruments of the Federal Building Code with emphasis on zoning	Classification according to Art. 14(1) Sentence 2 Basic Law as content and limit of property based on German Constitutional Court and Federal Administrative Court jurisdiction	Classification according to investment protection standards as indirect expropriation and violation of fair and equitable treatment based on international arbitral jurisdiction` (e.g., ICSID; NAFTA; UNCITRAL)
Building permission	Content and limit of property	Indirect expropriation; de facto deprivation of landowners´ disposition in case of legal limitation
Legally binding land-use plan (zoning); see Sect. 9, 30 and 31	Content and limit of property	Indirect expropriation, violation of full protection and security
Planning Damages; see Sect. 39-44	Content and limit of property; direct expropriation (legally disputed)	Problem of converting building land into greenfields and ecological zones: indirect expropriation; violation of the investment-backed expectation (legally disputed)
Development Freeze; see Sect. 14	Content and limit of property	Indirect expropriation; violation of fair and equitable treatment and the "reasonably to be expected economic benefit" (as investment-backed expectation)
Urban Renewal Measures, e.g., to eliminate functional and substantial nuisance; see Sect. 136-155	Content and limit of property	Problem of restrictions on private property during the measure: Indirect expropriation; violation of fair and equitable treatment
Urban Restructuring Measures, e.g., for shrinking settlements, conversion of industrial and former military areas into housing plots; see Sect. 171a-d	Content and limit of property	Problem of down-zoning measures, the "terminated building law" and the elimination of construction laws: indirect expropriation; violation of fair and equitable treatment

Landowners have no general legal claim for compensation.[18] Third-party limitations on land use, particularly in the public interest (Sect. 40 and 41 of the Federal Building Code), or the 7-year time limit set out in Sect. 42(2) of the Federal Building Code, according to which an entitlement to compensation can only arise when and to the extent that the landowner has commenced use, constitute an infringement of investment standards. This might be interpreted by courts of arbitration either as

[18] Decision of the German Federal Administrative Court, 47, p. 144.

direct or indirect expropriation, or alternatively, as a breach of the further protective standard of fair and equitable treatment (Thiel, 2016, 2011).

Down-zoning measures must be proportional. Under the CETA regime, the compensation paid to the "regulation-goes-too-far-affected" landowners can differ significantly compared to the current principles of compensation for the *lost* values, according to the legal requirements of proportionality, the guarantee of property based on Art. 14 of the Basic Law and Sect. 903 of the Civil Code, and the rule of equality based on Art. 3 paragraph 1 of the Basic Law (see Figs. 2 and 3). The duration of the regulation and limitation on ownership and investment must also be considered. For example, the court of arbitration in the case *Wena Hotels v Egypt* ruled that duration of a limit on development running between 10 and 12 months is no longer classified as temporary ("ephemeral").

As shown in Table 1, the German Federal Building Code offers various instruments to implement public land policies as means of intervention with private property: expropriation, pre-emption law, land readjustment, urban restructuring, and the important instrument of development freeze (Sect. of 14 Federal Building Code). These instruments such as pre-emption rights, urban readjustment, or land use plans result in an encroachment of private property, which is subsumed under the content and limit of property instead of a *direct* expropriation. Any compensation claim can be brought before arbitration tribunals instead of national cognizance. Consider this example: since the investor has the duty to realize the project within a given time and to allocate planning costs, in case of inability of the investor

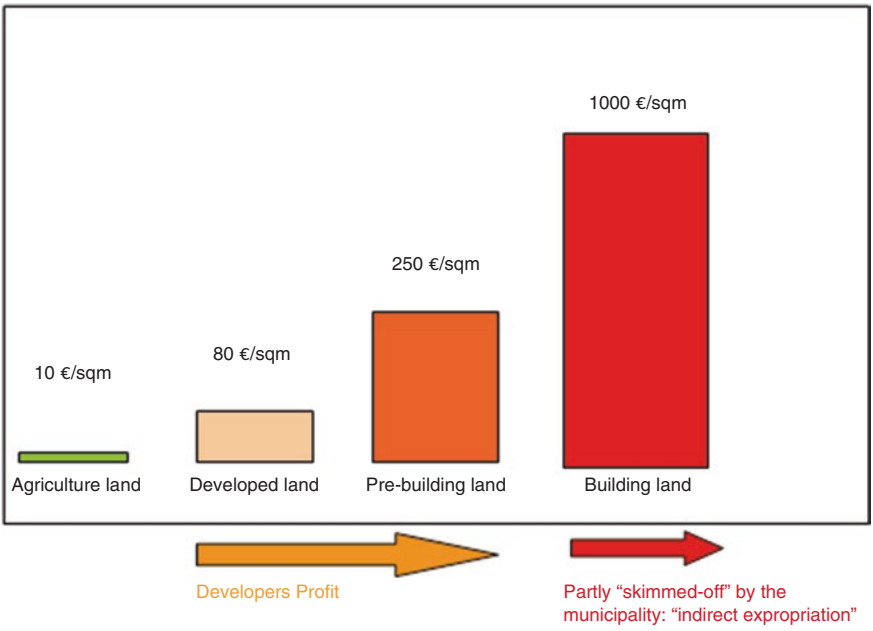

Fig. 3 "Stairway to heaven": Rising land values as a consequence of planning

to carry out the contracts' duties, the municipality shall terminate the legally binding land-use plan (Sect. 12(6) Federal Building Code). The same applies to a development freeze (Sect. 14 Federal Building Code), to planning permission limited in time for refugee housing (Sect. 246(17) of the Federal Building Code), a temporary building permit (Sect. 9(2)), or for urban renewal (Sect. 171a-d of the Federal Building Code) if the real estate investor considers it an "arbitrary" change or limitation in time of the municipal urban renewal measure, and if the measure is necessary in connection with downzoning and limiting construction (see also Table 2).

The introduction of a duty to bear the costs of dismantling recycling land does put off owners and violates the fair and equitable treatment standard. The provision for the commune to take such measures instead and an active dismantling requirement—continuation of Sect. 179 of the Federal Building Code—are nothing more than the proverbial "sword in the cupboard." Measures in the portfolio for urban renewal, urban reconstruction, renovation but also demolition can primarily be achieved through subsidies, but scarcely through legal agreements and only, to a limited extent, through involvement by the landowners themselves in the planning, infrastructure and follow-up costs. In theory, communes might buy up more junk real estate and re-sell it to third parties (e.g., cooperatives or construction groups) who then maintain the buildings. Municipalities have a more prominent role than the first buyers or even investors. In practice, pre-emption rights (see Table 2) will come under legal scrutiny in a CETA regime since these interventions may interfere

Table 2 Selected planning and land policy instruments with implications for investor's economic expectations, risks, legitimacy, and democratic controllability

Planning and land policy instruments	Profit and risk		Public and democratic controllability	Remarks; legal conditions
	Benefit	Costs/Risk		
Legally-binding land use plan	Private landowner	Municipality	Minor	Open for bargaining between landowner/investor and municipality
Land readjustment	Private landowner and municipality	Private landowner and municipality	Minor	Often a prerequisite for legally-binding land use planning
Developer model	Private landowner and municipality	Private landowner and municipality	Limited	Depending on the design of the urban contract
Pre-emption right	Municipality	Municipality	High	Depending on legal terms of the contract (land value, compensation, time)
Hereditary building right	Municipality	Municipality	High	Hereditary building rights may conflict with fiscal targets of the municipality; complicated contract design

with the principle of fair and equitable treatment or constant (or full) protection and security as well as protection against unreasonable or discriminatory measures.

Fig. 3 shows the dependencies of rising land values on the "machine of planning." Land values increase due to neighbourhood development; they are only partly being skimmed-off for the sake of public budgets in case of refinancing infrastructure and facilities connected with the private immovable properties. Similar to Public Private Partnerships (PPPs), the local planning authority is obliged to decide on the investors' application. Any modifications of the land use plan—such as the type and extent of the building, plot and parking area, energy efficiency standards, architectural shape of the façade, or the compulsory planting of trees within the building or commercial area—seriously impact investments, land values, and economic expectations (see Fig. 3). Obligations minimize the developer´s profit and reduce the possibility of the highest and best use.

The project and infrastructure plan ("developer model") is prepared to realize a specific project by a legally-binding plan including a contract, and tied together by the written agreement of implementation between the investor and the municipality (see Table 2). Plan and contract determine the limit and content of the investment including its expectation of profit (see Fig. 3). The assumption is made that what is known as the "freedom to build" forms an essential element of the individual land ownership, although it cannot be derived from Art. 14(1) paragraph 1 Sentence 1 of the Basic Law (Thiel, 2011, 2016). De facto, risks and benefits are often divided. Individual landowners are only entitled to make (personal) use of the theoretical building freedom to build where it is possible to ensure that the building activity does not counteract public purposes and controllability (e.g., environmental regulations, fiscal targets, infrastructure or energy supply issues), and qualifies to be permitted. The owner's right to build is thus formed by urban development law, construction statutes and instruments such as land readjustment, according to Sect. 45 of the Federal Building Code (see Table 2). It does not include or create a right to *future profits* from property.

5 CETA Implications for the Procurement and Bidding Procedures of Plots: Towards an Increased Transparency of Auctions for Cadastral Parcels?

CETA forces local municipalities to tender water supply, energy, public land properties, and all services of general interest (Costamagna, 2015; Krajewski, 2014, 2015b). Based on the so-called negative list approach ("list it or lose it"), tender processes for immovable properties such as land and natural resources are not excluded from the list of investment objectives. German Construction Contract Procedures, European procurement law for constructions, but also the Ordinance on Procurement for Assignment Concerning Traffic, Water Supply and Energy are based on the principles of competition, transparency, and the equality of bidders. Any discrimination is unlawful. In

Sect. 2 and 17 of the German Construction Contract Procedures, Part A, the non-discrimination rule is embedded within the general principles of procurement law. Competition is, as a matter of course, the core element of public procurement. The basic rights shall bind the fiscal auxiliary business of the public administration such as construction contracts, public land sales by land funds, and real estate agencies owned by the federal or state governments. In primarily applicable EU law, the prohibition of discrimination also applies without adaption to national law; it applies to all procurements in the construction and energy sector. European law prohibits the participation of a limited number of undertakings or business entrepreneurs only from selected European countries in the awarding process, such as written documents only, or made exclusively available in the local language. The principle obliged the contracting authorities to treat all participants in the tendering procedure equally, although similar situations are present, unless a disadvantage is due to the Law against Restrictions of Competition expressly commanded or permitted.

In German municipalities such as Hamburg, Ulm or Berlin a "carefully considered" awarding of land that is not necessary for operations often includes a concept tender in addition to ecological and social criteria instead of the free bidding procedure. These provisions may conflict with the CETA pillar of "free and unlimited competition policy" and procurement, especially with the establishment of competition laws to prevent unfair und unequal competition and to protect legitimate investment-backed expectations. The investments are protected in a special manner for investors from the European Union in Canada and conversely of Canadian investors in the European host states (excluding Great Britain due to the "Brexit" vote). The treaty differs significantly from the property protection of (domestic) European investors engaged in the EU and of (domestic) American investors engaged in the United States as a "discrimination of domestic investors" (Flessner, 2015; Krajewski, 2014), followed by an unlawful mandatory privilege of CETA investors by the host state.

CETA also affects the Budgetary Law and fiscal provisions of the German capital. The regulating factors for a sustainable budgetary policy are to set and withdraw incentives. The starting point is the budgeting based on the cost accounting. Take Berlin as an example. This strategy could be based on Sect. 63, paragraph 2, of Berlin's State Budget Ordinance, which states that: "assets can only be sold if they are not needed in the foreseeable future to fulfill the tasks of Berlin." In the case of the sale of real estate classified as not needed for operations, this condition cannot be assumed to always be met. Without taking stock of the portfolio in advance (exact portfolio analysis) there is no guarantee that subsequent additions to the sales portfolio will *not* restrict the fulfillment of the state's tasks. We should consider the fact of political controllability versus the privatization of land properties for debt reduction, since another aspect would be to abolish or at least fundamentally revise budgeting based on cost accounting in order to restore political controllability in the districts in the fields of urban and real estate development. The objective is to be to break through the short-sighted budgetary logic that is resulting in the sale (and investment contracts with parties from Canada under the CETA-regime) for debt reduction of community spaces that are—due to the influx of approximately 40,000 inhabitants to Berlin per year—urgently needed in the near future such as properties

for kindergartens. It may also prove useful to introduce a stockpiling system for spaces for public use that are removed from the sales process and are available for future use by the community (Thiel, 2015)—especially because matters of urban policy, including measures in favor of the public welfare and utilitarian housing policies are continuously changing.

According to the current (budgetary) logic, the decision-makers are acting as if there is no tomorrow or as if the future needs of society were already set in stone. Yet a few years ago, one did not know that more childcare facilities are urgently needed. These buildings have been sold by the former land fund and the districts have scarcely any suitable land left in their portfolio that is to be converted for childcare facilities quickly and cheaply. Parcels such as parks as commons are to be taken out of general commerce as *res extra commercium* and thus from the investment based on the protection provisions. Usually, it is the defined use set out by the planners (Sect. 9(1) of the Federal Building Code) and the efficiency of legally-binding land use planning that takes away the marketability of real estate. Because of the requirements of the development plan, spaces like these are likely be sold to buyers or users such as the public sector, foundations, funds, public-sector institutions or initiatives. The German Valuation Ordinance does not provide for a potential value as it does not provide the Discounted Cash Flow (DCF) method. There is a valid concern that a potential value in the area of the price level obtainable in conventional bidding procedures would far exceed the fair value of a piece of land and would thus constitute a "speculative market value." What is certain is that the approach of valuing real estate also based on its socio-economic utility value (including a defined use in the price calculation and including it in a life cycle analysis of urban development) would *not* be served adequately by a potential value or by the DCF method. DCF is the most-favored property valuation approach by investment tribunals to determine the economic consequences of a violated fair and equitable treatment standard, and of the compensation for an indirect expropriation or a "disappointed" investment-based expectation. It is also questionable whether an urban return by companies of the creative industries could be validated appropriately by a rather speculative market value.

6 Conclusion

Three main concluding points should be highlighted:

First, CETA contains a fair and equitable clause, which may be interpreted in a way that any state interference with the investor´s property requires the payment of full, prompt, and effective compensation. The clause significantly interferes with the host state's right to regulate. In other words, the wording of the provisions on expropriations (Chap. 8 of the Treaty) might turn out to be the opposite of what the treaty regulates regarding fair and equitable treatment. "What sounds good at first sight, might be turned to its opposite" (Gildeggen & Willburger, 2016). CETA is unique due to its binding nature on member states, especially the obligation of

decisions made by dispute settlement tribunals and litigation, with the possibility to avoid interventions of national governments, parliaments, and courts. Domestic constitutional courts such as the German Federal Constitutional Court are avoided by investors and the ability is given to keep secret negotiations, investment decisions, arbitration cases, and disputes over the violation of the fair and equitable treatment standard. CETA as legal standard has become the most important standard in the protection of foreign investment against host states. To be compliant with the FET standard, federal and municipal planning and land policy tools must be enacted and applied in a proportionate manner. Proportionality is an important element of investment protection and its standards. Unlike BITs, the Canada-EU treaty is unique in respect to the competency to "overrule" future national laws—to influence the efficiency of planning and property laws—and introduce standards and norms in favor of regulatory convergence to the detriment of national parliament's legislation and the democratic legitimacy.

Second, CETA is not a "carte blanche" for undisturbed investments in Europe and the United States. However, there are challenges and institutional changes for the land policies in all host states if the free trade agreement will come into force, such as the introduction of the concept of "indirect expropriation" and the principle of fair and equitable treatment that results in regulatory takings by statute and by inner-state administrative law such as environmental, planning, and building law represented by the Federal Building Code and the Law against Restrictions against Competition. The overarching goal is investment protection and promotion as the raison d´être which is an unknown category within the national land policy in general and particularly the constitutional provision by Art. 14 of the German Basic Law.

Third, the core question must be raised: what will be the consequences for the land policies in respect to the three pillars: market access, regulatory cooperation, and (new) rules beside and above national legislation? Take *MTD Equity v Chile* as the leading investment arbitration case in point that involves land use planning and land policy issues. While the host city/state such as Berlin is entitled to determine its legal order, the investor has a legitimate expectation in the stability and persistence of the urban planning decisions to facilitate rational planning and decision making. Arbitrary reversal of these expectations will constitute the violation of the fair and equitable treatment standard. The final conclusion is therefore that the criteria of CETA—i.e., transparency, minimum treatment of national investors, and non-discrimination—will have predominantly negative effects on the German federal and state/municipal land policy.

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Part IV
Social and Political Dimensions of Zoning

Checks and Balances in Planning Decentralization: Lessons from Ontario

Eran Razin

Abstract Recent discourses on planning reform have been characterized by a shift from centralized hierarchies and rigid tools to decentralized networks and "softer" tools. However, reforms have not been unidirectional, either because of pluralist decision-making, or of conscious attempts to assure checks and balances in the system. Understanding explicit and implicit checks and balances is crucial in the evaluation of planning systems and in assessing steps towards rescaling of planning powers. The analysis of the Ontario (Canada) planning system, consisting of a comprehensive overview and tracking several residential projects, identifies checks and balances that have accompanied decentralization of powers to local government. These consist of an effective provincial appeal board, binding provincial planning documents, municipal official plans approved by the province, and high quality planning bureaucracies at the local government level (benefitting from past municipal amalgamations), in a system not infested by endemic corruption. The provincial appeal system and the use of ad-hoc density bonusing as a major flexible planning tool are subjects of substantial controversy, but the Ontario system demonstrates checks and balances that involve the central state, local state and an autonomous appeal system, and a balance between elected decision makers and qualified professional bureaucracy.

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1 Introduction

Urban planning has become an interdisciplinary science in recent decades, aiming to balance objectives of environmental sustainability, economic competitiveness and social inclusiveness (UN-Habitat, 2009). Planning is of crucial significance in encountering challenges such as soaring housing prices and mass-immigration. However, it is under such crisis conditions that pressures to reform the planning system become most acute, particularly when the system is blamed to be inefficient and unable to respond in time to pressing needs (Nadin & Stead, 2014).

Whereas reform discourses have tended to emphasize devolution, localism, flexible networks and soft modes, actual steps have apparently been less unidirectional, reflecting diverse pressures. Such steps can produce checks and balances that are explicitly crafted, but more often evolve in an unplanned manner. The effectiveness of checks and balances is a major component in the evaluation of planning systems; yet these are rarely explicitly specified, and their mere identification, legal and political foundations, and actual functioning require a thorough study of the planning system.

This chapter aims to identify and assess checks and balances in the Ontario, Canada, planning system. Ontario is assumed to present a case of an advanced, well-functioning system that is apparently not shaped by a particularly exceptional political culture, such as Dutch centralization that is balanced by unique compromise culture and consensus politics (Van Der Horst, 2016), or American self-government traditions (Vogel & Imbroscio, 2013). Canada in general and Ontario in particular can be argued to have "middle of the road" planning systems, characterized by greater acceptance of "European style" top-down planning regulations than the United States, but substantially influenced by the latter. The greater Toronto region (the Greater Golden Horseshoe—Fig. 1), being Canada's major urban hub, faces challenges of rapid growth and real estate booms coupled with growing environmental awareness, serves as an appropriate context that demonstrates the acute role of checks and balances in planning.

This study was conceived in the context of planning reforms in Europe and Israel, asking whether steps such as the abolition of the regional level of planning and the decentralization of powers to the local level imply more flexible "soft spaces" and diminishing top-down oversight and coordination of planning policy. Skeptical views have been expressed on the merit in evaluating planning systems and proposing reforms based on best practices in spatial planning elsewhere. These views emphasize that best practices are frequently not properly evaluated for their actual implications and transferability to different settings (Stead, 2012). Selective insights from best practices occasionally serve to legitimize steps that are practically sought regardless of their consequences elsewhere. However, comparative insights can still be most meaningful, even essential for proposing and assessing reforms, despite differences in economic, social, political and spatial settings, and experiences in other countries (or provinces) indeed influence substantially local debates. Stead (2012) proposes to search for common principles that are applicable and desirable for all planning systems, and following his direction, I aim to identify

Fig. 1 Ontario and the Greater Golden Horseshoe (Ontario Ministry of Municipal Affairs, Growth Plan for the Greater Golden Horseshoe, 2006, Office Consolidation, June 2013). Adapted from https://www.placestogrow.ca/index.php?option=com_content&task=view&id=359&Itemid=12#appendix1

implicit and explicit checks and balances in planning systems. These may vary from place to place in their details, but the crucial need for them in a well-functioning system that meets its objectives is universal.

The analysis of the Ontario planning system was based on a comprehensive overview of legal, administrative, policy, and research documents, on 50 interviews conducted in the years 2014 and 2016, and on tracking in detail four residential projects: Regent Park, Toronto; Emerald City (Parkway Forest), Toronto; Varley Plaza, Markham; and Bayview Northeast Area 2C West, Aurora. This chapter does not present the detailed examination of these residential projects, but focuses on the identification of the checks and balances, as revealed from the written material and interviews, discussing their attributes and significance for further comparative research of planning systems.

2 Comparing Planning Systems

Planning systems can be defined by two major scales: centralized vs. decentralized decision-making and rigid/"hard" vs. flexible/"soft" modes of planning (Fig. 2; Razin, 2015). Centralized systems are characterized by substantial planning decision powers retained by central state agencies, including states or provinces in federal countries, and by planning hierarchies that usually include a substantial regional component, in which each spatial-administrative-political level is subordinate to decisions made by the higher level. Decentralized systems assign most planning decision powers to the local government level and may have more developed governance networks that engage diverse actors.

At the one end of the scale of "hard" vs. "soft" modes of planning are systems characterized by dominance of binding detailed land use plans at the city-wide, regional and perhaps even national levels. Softer modes of planning include open-ended plans that are less bound by fixed spatial outcomes, enabling adjustment to unpredictable circumstances (NAI, 2012), followed by strategic non-statutory plans or planning guidelines that are prepared by public planning agencies, reducing the

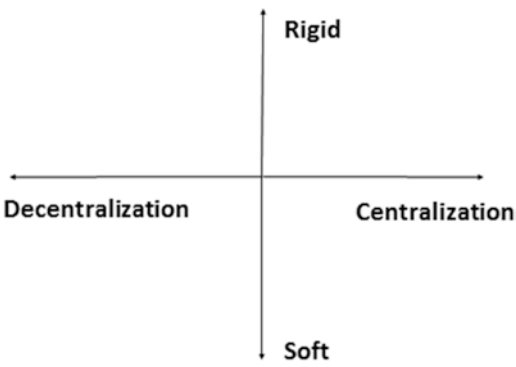

Fig. 2 The two major scales of planning systems

role and detail of land use plans. A further level includes soft spatial plans conducted by horizontal partnerships of local governments, NGOs and alike, which are not part of the formal statutory system (Faludi, 2010). Finally, the notion of "soft spaces with fuzzy boundaries" (Allmendinger & Haughton, 2009) refers to plans that are not constrained by definite spatial boundaries, acknowledging the complexity of overlapping jurisdictions and the blurred boundaries of urban regions (Sancton, 2008). These serve the purpose of sub-regional strategic planning, attempting to fill the vacuum created by the abolition of formal regional planning, or ad-hoc objectives of addressing complex cross-boundary issues (Galland, 2012; Olesen, 2012). This concept has been interpreted as an instrument of neoliberal governance to break down old rigidities and aim to rework interscalar governance relationships, transforming spatial planning from visionary approaches to pragmatic negotiations (Allmendinger & Haughton, 2010; Haughton, Allmendinger, & Oosterlynck, 2013).

Comparative research of planning systems in Europe has identified diverse planning traditions (Getimis, 2012; Knieling & Othengrafen, 2009; Reimer, Getimis, & Blotevogel, 2014). Nevertheless, it has highlighted a rather universal discourse of planning reform that emphasizes a shift towards more strategic oriented planning objectives, more flexible and informal tools, and an erosion of traditional hierarchies, such as the abolition of the regional scale of planning in England (Cullingworth et al., 2015) and Denmark. A move from government hierarchies to governance networks, and from command and control to consensus-oriented policy and planning styles have been observed, speculated or promoted.

3 The Multidirectional Nature of Reform: Explicit or Implicit Checks and Balances?

Planning reforms frequently focus on the rescaling of planning powers, with values of democratization, participation, market-driven neoliberalism, or the need to flexibly adjust to global transformations used to justify vertical downscaling; i.e. decentralization of decision-making powers to local governments. Rescaling is accompanied by horizontal re-allocation of responsibilities among different actors (public, private, non-profit, inter-municipal cooperation); i.e. movement from formal government hierarchies to collaborative governance networks (Getimis, 2012). Hence, rigid, welfare-oriented, steering roles of planning have been arguably replaced by a facilitating role of soft planning led by decentralized partnerships of governance, promoting competitiveness and efficiency, occasionally in a context of "soft spaces with fuzzy boundaries."

These trends suggest a clear link between the decentralization of planning and the employment of soft modes, seen as an integral part of bottom-up decentralized flexible networks and partnerships. However, this association may not be straightforward. Decentralization can be associated with the application of "hard" planning tools, and centralization may be associated with pressures to weaken rigid regulatory

tools, particularly to soften planning regulations that apply to central state action. Central state politicians may lead pressures for "fast track" solutions, calling for the recentralization of planning powers in crucial issues, and the application of soft modes that simplify and shorten planning procedures and reduce environmental and community based opposition.

Moreover, reforms are not necessarily unidirectional or even coherent. It can be argued that explicit or implicit decentralization reforms tend to be accompanied by recentralization counter-steps. These are either explained by an inherent resistance of central state politicians and bureaucrats to cede powers to local governments, or by pressing national objectives, prioritized in crisis and emergency situations, such as a housing crisis or mass-immigration. These arguably require upscaling and top-down oversight of planning policy. Goals of sustainable development and social justice may also require centralized oversight. Hence, abolition of a regional level of planning in the name of decentralization could involve shifting upward crucial powers, practically downloading mainly day-to-day mundane tasks. A trend towards softer modes of planning could also paradoxically include steps at the other direction. The introduction of soft planning approaches in Denmark has been accompanied also by the formation of more rigid statutory forms of planning, such as the Copenhagen updated 2013 Finger Plan (Elinbaum & Galland, 2016).

A major challenge of planning reform is thus to achieve an appropriate balance rather than to implement unidirectional reforms of decentralization and softer tools. Contradictory steps of decentralization and up-scaling that occur simultaneously, and the employment of rigid forms of planning along with the introduction of soft modes of planning, could indicate conscious attempts to assure sufficient checks and balances in the system—for example, oversight and coordination of empowered local decision-making. However, they could also indicate pluralistic decision-making that can be inconsistent, reflecting diverse pressures within the planning and political systems. Various mechanisms are thus fully explained only by historical specificities of the planning system. Understanding these (rarely) explicit and (more often) implicit checks and balances is crucial in the evaluation of the planning process and its outcomes, and in assessing steps towards either decentralization or recentralization, or other forms of rescaling of planning powers.

4 The Ontario Planning System: Eroding Hierarchy and Renewed Checks and Balances

Ontario's planning system is essentially two-tier: central state and local governments, but about a half of Ontario's population resides in a two-tier local government system—the upper tier consisting of counties or regional municipalities. City/local government councils hold most decision-making powers to approve plans, assisted by their professional city planning departments. Following two waves of municipal amalgamations—the first mainly in the late 1960s and early 1970s and

the second in the years 1996–2002 (Fischler, Meligrana, & Wolfe, 2004)—urban space in Ontario is managed by municipalities that are sufficiently large to maintain qualified planning departments. Contrastingly, in some small sparsely populated municipalities, most plans require provincial approval, and planning powers could be assigned to planning boards established by the Province.

4.1 Decentralization of Post- World War II Hierarchical Structures

Ontario's post- World War II planning system was unique in North America in its structure and outcomes. It was largely a creation of the 1946 Planning Act, and later of the establishment of Metro Toronto in 1953 and more regional municipalities in the early 1970s. The system became a hierarchical one that is plan led, rather than zoning-based (Hess & Sorensen, 2015; Sorensen & Hess, 2015). Legally binding municipal official plans became obligatory at both levels of regional and local government, although Metro Toronto's official plan was not formally approved by the council. The official plans have been accompanied by more detailed secondary plans for particular neighborhoods. Zoning by-laws and subdivisions were thus only the final phase in the planning process, having to comply with the principles and land use designations specified in the upper tier plans.

The hierarchy of plans was linked to the three-level government hierarchy that included the province, upper tier regional municipalities and lower-tier municipalities. At the regional and lower levels powers were given to local planning boards appointed by city councils. These boards did not include elected representatives, in order to keep politics out of planning. The Metro Toronto Planning Board also engaged in planning in adjacent suburbs beyond the boundaries of the metropolitan municipality (White, 2007). The top-down structure, unique in North America, included a required provincial approval for municipal official plans. The province (the minister in charge of planning) also held the authority to approve new subdivision decisions of the planning boards, including the Metro Toronto Planning Board. These were submitted as recommendations to the minister for final approval. The separation between appointed planning boards and elected city councils was another element in the rather centralized system of checks and balances.

Whereas post- World War II urban development in the Toronto metropolitan area was perceived to resemble the North American pattern of automobile-dependent urban sprawl, the checks and balances in the planning hierarchy did produce an attenuated version of that model (Filion, 2010). Suburbanization was denser and more planned than in other North American metropolitan areas (Hess & Sorensen, 2015) and Toronto had become one of North America's two least sprawling metropolitan areas, the other one being Montreal (Razin, 2005; Razin & Rosentraub, 2000).

Decentralization of the post- World War II system had not occurred as a one-time comprehensive reform, but as a series of smaller steps that were not neces-

sarily coherent or unidirectional. These frequently took place following the election of a new government, sometime to be reversed when the next transition of power took place. Appointed planning boards lost legitimacy and ceased to exist, except for sparsely populated Northern Ontario. The powerful Metro Toronto Planning Board lost power and was abolished in 1975, and thus regional planning in metropolitan Toronto was practically off the agenda. Indeed, the period 1971–2002 was defined by Filion (2010) as the era of low-density outer suburban development.

A 1977 report of the Planning Act Review Committee called to a near total withdrawal of the province from municipal planning, and the 1983 Planning Act gave the province the option to delegate planning powers to municipalities (White, 2007). Further reforms in the Planning Act reflected changes in the identity of the ruling party in the provincial government, from the Liberals through the NDP to the Progressive Conservatives, the latter emphasizing local self-determination. Provincial approval for lower tier municipal official plans and for any municipal official plan amendment were no longer required, and large reductions in the provincial government staff engaged with planning were consequently made. However, decentralization was far from being radical and the seeds of a new element in the checks and balances were sown in those years: an initially non-binding Provincial Policy Statement and early provincial plans for areas of high sensitivity; the Niagara Escarpment Plan; and the Oak Ridges Moraine Conservation Plan. These new elements in the planning system were vastly extended and strengthened following the return of the Liberals into power in 2003.

4.2 The Reemergence of New (and Old) Checks and Balances—Overview

The Ontario planning system represents a gradual shift that largely occurred during the 1980s and 1990s, from a traditional hierarchical system, in which most plans required approval of the Ministry in charge of planning, to a system in which most plans are approved by city councils, up to the level of Municipal Official Plan Amendments. Nevertheless, the shift has been accompanied by strengthened checks and balances; some existing for many decades and the others evolving along with the transformation process, particularly following the election of the Liberal provincial government in 2003.

A first component of these checks and balances is an effective provincial appeal board (The Ontario Municipal Board—OMB) that applies to nearly all planning decisions, from minor variances to official plans. A second component includes legally binding provincial planning documents, mainly the Provincial Policy Statement, the Greenbelt Plan, and the Places to Grow Growth Plan for the Toronto region. These documents emphasize protection of open spaces and allocation of growth and while their roots can be traced in the 1970s, the major ones were

prepared and approved in the years 2003–2005, apparently also as a reaction to decentralization of planning powers to local government and the demise of regional planning decades earlier. Decisions of the province, local government and the OMB must be consistent with these planning documents. A third component of checks and balances are mandatory Municipal Official Plans approved by the Province and a final component includes high quality planning bureaucracies at the local government level, apparently benefitting from past municipal amalgamations. Local politics that are not infested by endemic corruption can be regarded as a precondition for the effectiveness of these checks and balances.

4.3 A Provincial Appeal Board

The OMB is an independent quasi-judicial board that is not part of the Ministry in charge of planning (The Ministry of Municipal Affairs and Housing), but rather sits at the Ministry of the Attorney General. Its members are of diverse backgrounds (not necessarily lawyers), and are appointed by the cabinet, based on recommendations of the Attorney General and a parliamentary committee. The OMB is unique in its powers in North America. It was established in 1906, initially engaged in local finance and rail infrastructure regulation, but evolved to become a planning quasi-judicial appeal board (Chipman, 2002; Moore, 2013a). Its decisions are final and a court appeal can be based only on illegal practice. Its decisions are not bound by precedents. The OMB should comply with the provincial planning documents, but can rule in favor of municipal official plan amendments (usually for increased density), against the will of the city.

Anyone can appeal to the OMB during a 20-day period after the city council's decision, as long as the objection was raised in writing or in the public hearing during the planning process. Moreover, the developer can also transfer the case to the OMB if the city council did not reach a decision by the time limit defined by the Planning Act: 180 days for an Official Plan Amendment (OPA) and 120 days for a rezoning application. Decisions on substantial applications are unlikely to meet these time limits, particularly in large cities such as Toronto, but presenting the case at the OMB could be costly and time consuming; hence sides may be cautious to appeal. However, developers may deliberately opt to transfer the issue to the OMB when the city is unlikely to approve their plan. The city may also opt for lining with community opposition for densification projects, leaving the "dirty work" of an unpopular compromise for the OMB. Hence, the OMB frequently acts as the main arena for the planning decision, rather than only as an appeal level on decisions already made. Nevertheless, the mere appeal to the OMB frequently motivates actors to negotiate more seriously with one another. Prospects for compromises may be higher when the threat of an uncertain OMB decision is on the horizon. Hence, decisions of the OMB are frequently based on agreements reached by the involved sides while the case is pending in the Board.

The OMB has been a source of considerable public debate. Its "pros" mainly consist of a crucial role as a "balancing institution" in a non-hierarchical planning system. It is generally considered as honest "fair broker," perhaps more development-oriented than the local authorities, and has not been tainted with scandals of malpractice or corruption (Siegel, 2009). Criticism of the OMB is partly ideological, regarding it as undemocratic, and contradicting North American planning traditions. The City of Toronto was reluctant however to form its own local appeal body for minor variances, because it shifts a financial burden from the province to the city, but finally established such a body in 2017, as well as a pilot for minor variance and consent mediation.

The appeal procedure at the OMB can be expensive for the public, unless the petitioners represent themselves without a lawyer and other professionals. The application fee is nominal, but the cost of legal and professional support can be prohibitive, reaching a quarter to half a million Canadian dollars in the case of substantial projects, and giving an advantage to developers over communities who must often rely on the support of the ward councilor. It has been argued that the procedure has become more a conflict resolution tool than a guardian of planning policies, suffering from excessive "legalization"—the mediation option in particular leading to prolonged delays. In fact, the conflictual nature of OMB hearings increases the role of planning experts and land use planning language in the procedures (Moore, 2013a). Being publicly funded, it suffers from a chronic shortage of manpower, particularly as OMB members receive no support for writing their report: a typical report on a complex matter that requires a clear evaluation and justifications could be 25–30 pages. However, one can argue that leaving the burden of writing to OMB members in fact constrains the ability to appoint unqualified persons to such tribunals/commissions.

Historical specificities having roots in the early twentieth century, rather than a conscious attempt to assure checks and balances as part of a decentralization reform, explain the mere existence and substantial power of the OMB. Its continued role, despite ongoing debate, is a product of Canada's and Ontario's political traditions that accept such centralized mechanisms that are not usually considered as legitimate in the United States. Although critique of the OMB largely focuses on its lack of democratic accountability and presumed pro-development approach (Pagliaro, 2017), the 2016 public consultation document on the OMB (Ontario, Ministry of Municipal Affairs and Housing, 2016) does not dispute the legitimacy and importance of an independent appeal tribunal. Interestingly, it justifies its role mainly on efficiency grounds, arguing that not having an OMB would result in more appeals to the court. Nevertheless, implicitly, if less so explicitly, the OMB serves as the major element of the checks and balances portfolio in Ontario, separate from both local government and the provincial ministry in charge of planning, and represents perhaps a reasonable balance between the near absolute powers of a bureaucratic tribunal and the legitimacy of elected politicians who appoint its members.

4.4 Binding Provincial Planning Documents

Binding provincial planning documents have largely evolved parallel to and perhaps in part as a reaction to decentralization of planning powers to local government. The Provincial Policy Statement (PPS) is an integrative policy document that defines land use policy principles. Its preparation or revision is required by law every 5 years, although the timetable has not been entirely kept and PPSs were adopted in 1996, 2005 and 2014 (Ontario, Ministry of Municipal Affairs and Housing, 2005b, 2014). The PPS is adopted by the Ministry of Municipal Affairs and Housing, following consultations and cabinet approval. Since 2006, decisions of the Province, Local governments and the OMB must be consistent with the PPS, while before 2006 decisions were required only to have regard to the PPS.

The roots of provincial plans at a regional scale were at the 1970s, justified by environmental rationale and each based on specific legislation. The earliest was the plan based on the Niagara Escarpment Planning and Development Act of 1973. The first Niagara Escarpment Plan based on this Act was approved in 1985, being revised several times since then. The 1973 Parkway Belt Planning and Development Act led to the preparation of the 1978 Parkway Belt West Plan for creating a transportation and utility corridor and linked open spaces that separate urbanized spaces. The Oak Ridges Moraine Conservation Act that passed in 2001, under Progressive Conservative government, led to the approval of the Oak Ridges Moraine Conservation Plan regulations in 2002.

The two prominent regional plans prepared by the province concerned the Toronto region: the Greater Golden Horseshoe. The 2005 Greenbelt Plan (Ontario, Ministry of Municipal Affairs and Housing, 2005a) was prepared by the Ministry of Municipal Affairs and Housing, following special legislation (Greenbelt Act, 2005), and focused on the delineation of areas to be protected from future development at the regional level (Fig. 3). The 2006 Places to Grow Growth Plan for the Greater Golden Horseshoe (Ontario, Ministry of Infrastructure, 2013) was prepared by the Ministry of Infrastructure, following special legislation (Places to Grow Act 2005), and focused on allocating the growth of 3.7 million inhabitants and 1.8 million jobs in the region by 2031. It emphasized densification, growth centers, strategic employment nodes, development restrictions in open space, transportation, and infrastructure planning principles (Fig. 4). It was revised in 2014 for target year 2041. Both plans are legally binding and decisions of the province, local governments (including their official plans) and the OMB must conform to them. These two plans are the most influential and celebrated among the provincial planning documents (Boudreau, Keil, & Young, 2009; Relph, 2014) and have been argued to represent the up-scaling of urban-regional regulation (Macdonald & Keil, 2012): planning at the regional/metropolitan scale by the provincial level of government.

Two recent plans of lesser significance are the 2014 Lake Simcoe Protection Plan, based on the 2008 Lake Simcoe Protection Act, and the 2011 Places to Grow Growth Plan for Northern Ontario. The emerging pattern for provincial regional plans has been for the parliament to enact the requirement to prepare each plan, assigned to a particular Ministry (different for each plan), followed by the preparation of the plan and its approval by the cabinet, and by an update every decade or so.

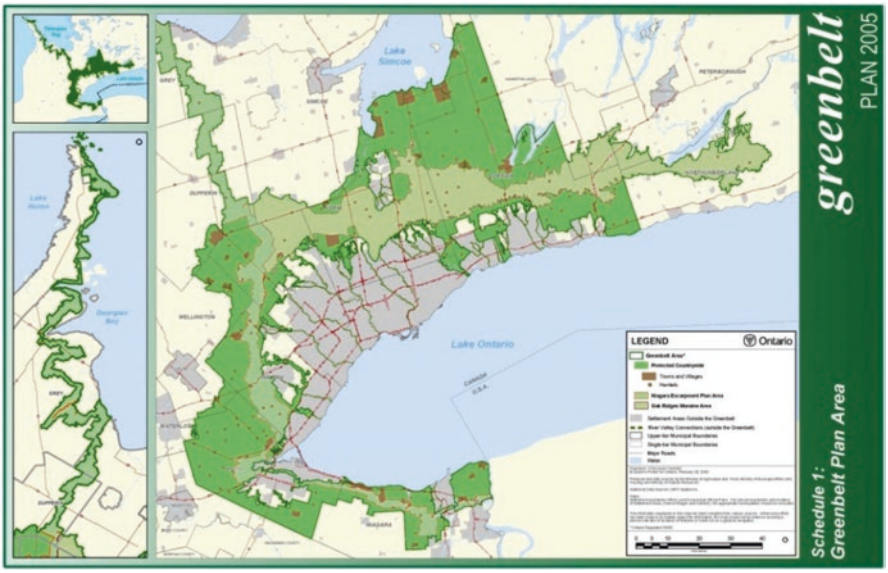

Fig. 3 The 2005 Toronto Greenbelt (Ontario, Ministry of Municipal Affairs and Housing, The Greenbelt Plan, 2005). Adapted from http://www.mah.gov.on.ca/AssetFactory.aspx?did=12342

4.5 Municipal Official Plans Approved by the Province

Each municipality in Ontario is required to have a municipal official plan. These plans have been one of the cornerstones in Ontario's planning system since 1946 and have to conform to the provincial planning documents. They are subject to the approval of the province (the Ministry of Municipal Affairs and Housing), except for bottom-tier municipalities in a two-tier structure, where the approval of the regional municipality is sufficient, and only the official plan of the regional municipality is subject to provincial approval. The official plan has to be assessed and revised every 5 years, although in practice this ambitious timetable is not kept. The level of detail in these plans varies. Some are rather detailed land use plans whereas others resemble softer structure plans (Fig. 5).

Official Plan Amendments are approved by the city council and do not require provincial approval. However, they are subject to appeals to the OMB that is bound by the provincial planning documents, but not by the municipal official plan and can even rule in favor of amending the official plan against the will of the municipality—for example, if plan amendments were approved in similar situations.

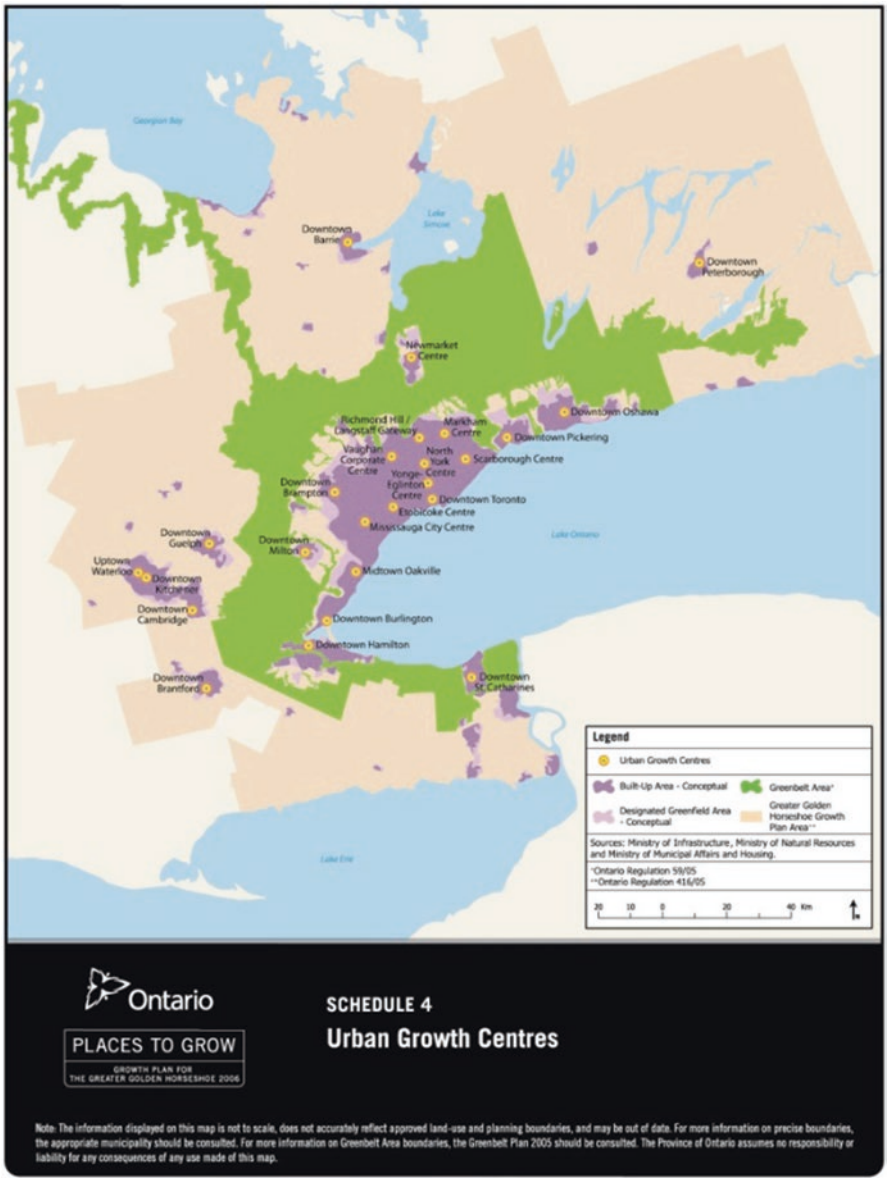

Fig. 4 Growth centers in the Growth Plan for the Greater Golden Horseshoe (Ontario Ministry of Municipal Affairs, Growth Plan for the Greater Golden Horseshoe, 2006, Office Consolidation, June 2013). Adapted from https://placestogrow.ca/index.php?option=com_content&task=view&id=359&Itemid=12#schedule2

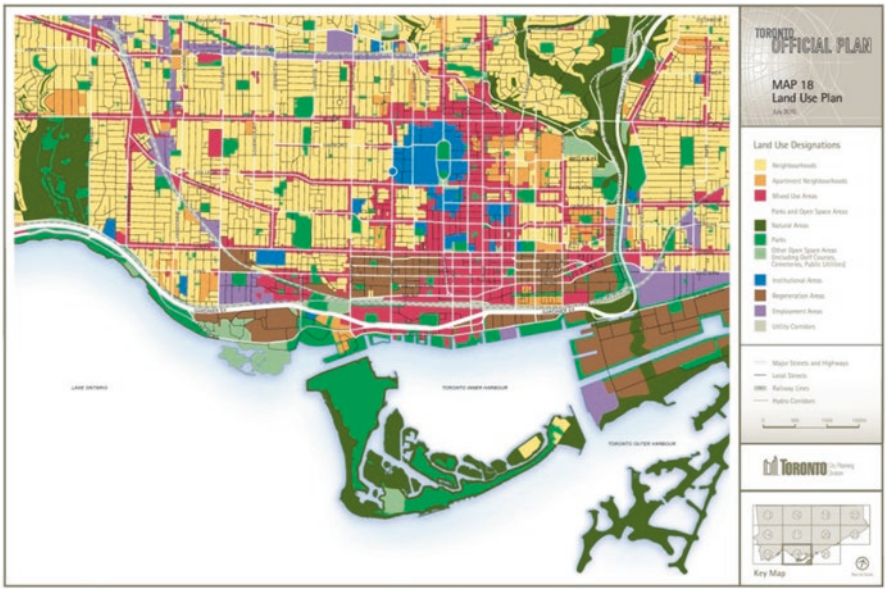

Fig. 5 Toronto Official Plan 2006: land uses in the downtown area (Toronto, Toronto Official Plan). Adapted from http://www1.toronto.ca/planning/18-landuse.pdf

4.6 High Quality Planning Bureaucracies at the Local Government Level

High quality and well-functioning planning bureaucracies are a crucial element in the checks and balances of decentralization, where planning decision powers are in the hands of municipal councils. Such qualified city planning departments are easier to maintain in large cities; hence the quality of these departments have apparently benefited from the two waves of municipal amalgamation that took place in Ontario, leading to the consolidation of Ontario's urban space into large- and medium-sized cities. The planning departments are largely funded by developers through high application fees. Procedures in the large cities are rather consistent and transparent, aiming to follow the "one address for the developer" principle. Requirements from the developer are clearly specified at the pre-consultation stage, before submitting the complete application.

The decentralization of powers to the local level in the last quarter of the twentieth century did not lead to a quicker process, because planning had concurrently become more interdisciplinary, requiring preparation of more studies and consultation with greater number of professional gatekeepers, concerning trees, archeology, environment, etc. The cost for the developer for the approval process for a substantial urban or suburban plan, including the application fees, preparation of a complete application (rezoning and frequently also a municipal official plan amendment), a possible appeal procedure at the OMB, site plans and permits, could amount to a

million Canadian dollars or more. Nevertheless, the planning procedure (not including an appeal to the OMB) is usually expensive but streamlined, from its pre-consultation meeting followed by the submission of a complete application. Its two main components of uncertainty for the developer are, according to interviewees, the negotiations with city councilors over the plan, particularly over height and density bonusing (Section 37), and the length of the procedure at the OMB, particularly if the mediation track is chosen.

It should be noted that local politics that are not infested by endemic corruption (either based on ties of developers and land owners with local politicians and bureaucrats, on kinship and ethnic ties, or pure kickbacks) are a precondition for the effective functioning of the above checks and balances, particularly to the role of the planning bureaucracy in these checks.

4.7 Transportation and Infrastructure Planning: External to the Land Use Planning System

Similar to other States and Provinces in North America, transportation and infrastructure planning is not part of the land use planning system and is not covered by the Planning Act. The approval of transportation projects is subject to the Environmental Assessment Act and planning is the domain of the Ministry of Transportation. Coordination with the planning system is largely informal, and the weight of political decision-making (versus professional-bureaucratic decisions) is greater than in land use planning decisions, given the high dependency of costly transportation projects, including mass-transit, on public finance, particularly of the province and the federal government. In fact, much of the planning process of transportation and infrastructure projects is internal, prepared within provincial ministries and agencies prior to the commencement of a formal procedure. Only when a political decision on funding and implementing the project is reached, the formal procedure would commence.

The 2006 Metrolinx Act established a metropolitan transportation authority—Metrolinx—that was given the task of comprehensive transportation planning for the Greater Toronto and Hamilton area, including the coordination of finance and development of the transportation system. The Act required conformance of the transportation plan for the Toronto region to the provincial plans (Greenbelt and Places to Grow). A non-binding non-statutory regional transportation plan for the Greater Toronto and Hamilton area—The Big Move—was published by Metrolinx in 2008 (Metrolinx, 2008; Fig. 6). The mandate of Metrolinx was expended in 2009 to include operation of the GO regional bus and rail system.

Critique on transportation planning in Greater Toronto has focused on insufficient coordination of transportation and land use planning and excessive political dominance that lacks sufficient professional input in the decision-making process. The establishment of Metrolinx has not led to a change in this respect, at least in the

Fig. 6 The Big Move 2008—15 Year Plan for the Regional Rapid Transit and Highway Network (Metrolinx, 2008)

domain of mass-transit. An interviewee argued that the bulk of planning activity concerns road construction and other infrastructure projects, despite myths associated with the work of journalist and urban activist Jane Jacobs, and the 1971 cancellation of the Spadina Expressway. Nevertheless, it is hard to define transportation and infrastructure planning as an element in the checks and balances of an integrated planning system. Rather, it is perhaps the most centralized element in the planning system.

5 Measures of Flexibility

5.1 Height and Density Bonusing—A Major Measure of Flexibility

Height and density bonusing, termed elsewhere as planning obligations (Burgess, Monk, & Whitehead, 2011), community amenity contributions (British Columbia, 2014) or developer obligations (Levine-Schnur, 2013), are not the soft planning approaches envisioned by the "soft spaces with fuzzy boundaries concept" (Allmendinger & Haughton, 2009; Galland, 2012). However, this form of value capture, specified in Section 37 of Ontario's Planning Act, is perhaps the main flexible "soft" element in a planning system otherwise based on traditional "hard" tools

Fig. 7 Toronto's Distillery District: condominium towers and a conservation project for arts and culture activities aided by Section 37 funding (photograph by author)

(Moore, 2013b). It also explains the high incidence of municipal official plan and zoning amendments—the other flexible element in Ontario's planning system.

Section 37 enables the approval of increased densities and heights in return to community benefits provided by the developer, such as community centers, day care facilities, parks, public arts, transportation improvements, affordable housing, and cultural amenities (Millward & Associates, 2013; Fig. 7). These increased densities should conform to principles of good planning, but are determined along with the required community benefits through ad hoc negotiations between the developer and the city, rather than through a pre-defined formula or a set of binding criteria. The elected Ward councilor usually has a major role in these negotiations, mediating between the community and the developer and the city planner. In fact, whereas the OMB erodes the power of councilors, in comparison to other North American cities (Moore, 2013a), negotiations over Section 37 benefits provides them a unique mediating power position. Height and density bonusing are apparently the most flexible and unpredictable decision in the planning process, but municipal decisions that concern these benefits can be appealed to the OMB if argued to be excessive, irrelevant to the project or disproportional to benefits demanded in similar projects.

Section 37 is a powerful tool to fund public infrastructure, particularly in areas with high real estate values and potential for densification. It can be used to create affordable housing and it serves to mitigate conflicts, primarily by encouraging agreements between the developer and the community. However, opponents of Section 37 point to the uncertainty that it creates for the developer, viewing the tool

as a sort of "legal bribery" developers have to pay in order to get their plans for increased densities approved. Others still argue that such a "bribe" benefiting the community is preferred over other types that benefit individual decision makers, quoting the Montreal corruption scandals revealed in 2012–2013. It has also been noted that the ad-hoc community benefits embedded in Section 37 are not expensive compared to alternative mechanisms of value capture elsewhere (Alterman, 2012), such as Vancouver's community amenity contributions (British Columbia, 2014) and Israel's betterment levy.

Measures such as Ontario's Section 37 are also argued to be unequal, benefiting mainly densifying urban centers with high land values, and leaving out low rise suburbs and rural areas with little funding for community centers, etc. A more general betterment levy or other forms of non-earmarked payments could reduce such inequalities between different parts of local authorities, because spending is not necessarily linked to the particular project charged. However, nullifying the link between the project charged and the amenities funded eliminates the role of Section 37 in mitigating conflicts and overcoming local opposition to densification projects.

Section 37 has led to deliberate downzoning (retention of low densities) in municipal official plans and zoning bylaws, motivated by the desire to maximize the ability to collect community benefits from the developers when official plan and zoning amendments for increased densities are submitted. Strikingly, nearly all substantial plans in Toronto are official plan amendments and/or rezoning amendments. Section 37 has nonetheless contributed substantially to densification, particularly to the proliferation of high-rise condominium development in Toronto (Rosen & Walks, 2014).

The critique on the excessive use of Section 37 has inspired proposals to adopt a more streamlined Development Permit System, in which a "final" plan is approved for a particular area. Such a plan will specify the accurate densification planned, including the community benefits to be provided by the developers, determined by standardized criteria. No changes in the plan would be permitted for 5 years after approval, through either municipal official plan amendments, zoning amendments, or minor variances, and the plan would be assessed every 4 years. Such a system would reduce uncertainty for the developer, lower planning costs associated with amending plans and save lengthy procedures at the Ontario Municipal Board. However, the system also diminishes flexibility in adjusting plans to changing circumstances, making the planning system more rigid than ever and limiting the power of the councilor in securing ad hoc benefits for its electorate. Indeed, the system has been implemented in Ontario only in a few cases that mainly concerned conservation and is more effective in constraining development than in directing substantial development.

5.2 *Traditional Zoning Rather Than Soft Planning? The Citywide Zoning By-Law of Toronto*

The prevailing trend in municipal official plans, particularly in the City of Toronto, has favored moving from rigid land use plans towards less detailed structure plans. However, the trend has not necessarily indicated softer and more flexible planning modes. Toronto's Official Plan might have become less rigid than past plans, but a citywide zoning by-law approved by city council in 2013 has been as detailed as ever, apparently going beyond compilation and serving as a huge integrated database, defining principles for the development of various uses (Fig. 8). The monumental project was initiated following the 1998 amalgamation of the six lower-tier cities of Metro Toronto and the metropolitan municipality itself into a single "megacity" in an effort to harmonize the zoning systems of the amalgamated cities. It includes 4000 maps, 1400 pages in a first general volume and links to layers of instructions. Areas with valid zoning by-laws that contradict the 2006 Official Plan were left blank.

Although the endeavor could have been interpreted as no more than a huge integrated database, harmonization of the zoning systems in fact involved substantial

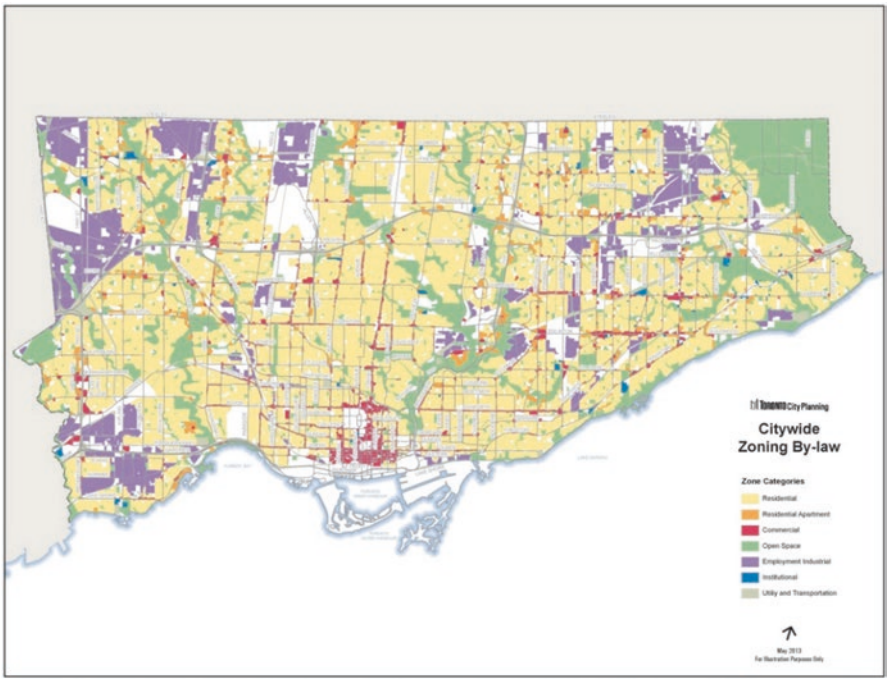

Fig. 8 Toronto's Citywide Zoning By-law, 2013—a general land use map (Toronto, Zoning Bylaw 569-2013). Adapted from www1.toronto.ca/city_of_toronto/city_planning/zoning__environment/files/pdf/city-wide_allzones_569-2013.pdf

policy input, and the outcome might be regarded as an extremely detailed rigid comprehensive city plan. This rigid nature of the citywide zoning by-law, combined with the municipal official plan, is mitigated by the high frequency of amending these plans: as stated above, nearly every substantial development in Toronto requires amending both the municipal official plan and the zoning by-law.

6 Conclusions

The Ontario planning system is largely non-hierarchical, i.e. most decisions are made at the city council level, but it includes elements of command and control. An effective independent appeal system is a major component of checks and balances in the system; its effectiveness presumably depends on the quality of appointments to the board and on sufficient funding for its functioning. An additional crucial component includes binding provincial plans and policy documents at the regional and provincial scales, and updated municipal official plans approved by the province. Professional municipal planning departments not infested by endemic corruption are another component in the set of checks and balances. The Ontario case hints that size matters; hence, municipal amalgamations might have contributed to the quality of planning departments.

The Ontario case thus emphasizes an inter-scalar balance in the triangle: local state—central state—autonomous appeal board. In other North American states and provinces, such as British Columbia, where external checks and balances such as an appeal system and binding regional plans are rare, checks and balances at the local level are of crucial significance. These consist of an intra-scalar balance in the triangle: elected council and mayor—professional planning bureaucracy—engaged community. Whether and under what conditions such an intra-scalar balance can serve as a substitute of some sort to an inter-scalar balance requires a broader comparative research.

Transportation/transit and infrastructure planning are markedly top-down and political in Ontario and even in systems that largely rely on an intra-scalar balance, such as British Columbia. However, these fields can hardly be considered as an element in the checks and balances of a decentralized system, but rather as external domains that are only partly coordinated with the planning system, and whose top-down features are at least partly explained by the dependence of projects in these fields on central state—provincial and federal—funding.

Decentralization and breaking out from a traditional three-level planning hierarchy does not necessarily mean the end of binding regional plans and of top-down regulation of planning decisions, and does not necessarily imply softer modes of planning. Indeed, the Ontario system employs rigid integrated land use planning tools, although these are accompanied by flexible implementation. The two major elements of flexibility are municipal official plan amendments, which are the rule rather than an exception, and ad hoc negotiations on height and density bonusing, the latter being the major cause for the former. Municipal official plans occasionally

took a less rigid structure plan approach in recent years, but rigidity has also been promoted, such as the 2013 integrated City of Toronto Zoning By-law, the aim to introduce the Development Permit System, and the enhanced regional scale plans prepared by the province.

Although acknowledging the limitations of imitating best practices from elsewhere, and the path-dependent explanations to the evolution of major institutions, such as Ontario's unique appeal board (the OMB), the Ontario system does provide applicable lessons, as an approach in-between decentralization that lacks sufficient oversight and rigid centralized hierarchies. Lessons from Ontario to 'old world' rigid hierarchical systems concern checks and balances that accompany the transfer of powers to local governments, "flattening" the planning hierarchy, without sacrificing regional coordination and resorting to (ineffective?) soft modes of planning. However, Ontario is an outlier within North America, perhaps resembling more centralized systems in Australian states. Is it an example for a future path or a diminishing North American model? Some of the checks and balances in Ontario have consolidated following the election of a Liberal government in Ontario in 2003. The Liberals are still in power for 14 years, and one can ask whether the system would largely remain intact following a political turn that is bound to come sooner or later.

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Revitalizing Land Use Law: The Burdens-Benefits Ratio Principle

Ronit Levine-Schnur

Abstract As a way of celebrating its centenary, I sketch out a vision of how to revitalize land use and zoning law. Such a vision is called for not merely because of the marking of 100 years of zoning. Due to the immense impact land use laws have on human lives and their surroundings, it is crucial to regenerate the land use law system and to ground it within an ethical foundation. A land use law system should be based on an ethical commitment to fairness and sustainability. It should be guided by principles of democracy and transparency; by norms of accessibility, diversity, and density; and by a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits. This chapter's focus is on the latter principle, which is demonstrated by two examples: on how to substantiate development agreements, and on how to analyze the distributive effect of eminent domain.

1 Land Use Law in Search for a Narrator[1]

There is probably no need for another historical review of how zoning started in particular, and land use law more generally. Mumford (1961), Hall (2002), and Wolf (2008), for instance, offer a few such investigations into the past. When marking the first 100 years of zoning, the reference is to the first comprehensive zoning plan. That plan was implemented in New York City in 1916 (Makeilski, 1966; Toll, 1969). "The Zoning Resolution," as it was officially called, regulated and restricted the location of different kinds of uses, such as industries and residential housing, the lot area to be built on, and the size and height of buildings (Fischler, 1998). Its model was soon to be followed by many other local communities in the United States and in Canada. The Zoning Resolution came after some 30 years of pioneering building restrictions which were imposed throughout North America, including Canada (Fischler, 2007; Valiante & Smit, 2016). Nonetheless, it was the first comprehensive attempt to do so, and for that, it gained its glory. Its lingering influence on other jurisdictions is evident, arguably, from the close legal ties that exist

[1] This Section is based on Levine-Schnur (in press-a).

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between, for example, Canadian and American land use jurisprudence despite the many legal and cultural differences between the two countries (Levine-Schnur & Ferdman, 2015; Metcalf, 2015; Morgan, 2012).

But there are at least two other competing milestones to mark the emergence of modern land use law. The first is the planning initiatives of late ninetieth century's architects, such as Ebenezer Howard, with his plans for utopian "Garden Cities," a detailed model for planned-from-above towns (Howard & Osborn, 1965). Or Frederick Law Olmsted with his successful efforts in the mid-nineteenth century to convince decision-makers in New York to fund what would later be known as the Central Park (Olmsted, [1870] 2013). Olmsted correctly predicted that such an urban park would have positive externalities on its surroundings, and that these could be used to secure high property taxes (Crompton, 2001). Howard and Olmsted advanced, in different ways, the idea that zoning and city planning can produce wealth, health, and prosperity, especially when they are binding and centrally directed. Distributional concerns were not their central interest, if an interest at all.

The second milestone in land use law was achieved in the year 1926, when two legal advancements occurred: The United States Supreme Court delivered its decision in *Village of Euclid v. Ambler Realty Co.* (1926), and the Standard State Zoning Enabling Act (SZEA) (1926) was enacted. In *Euclid v. Ambler*, the U.S. Supreme Court upheld, for the first time, a comprehensive zoning ordinance, in that case of the Village of Euclid, a suburb of Cleveland, Ohio. The Supreme Court affirmed the constitutionality of zoning ordinances, and ruled that a zoning ordinance must be "clearly arbitrary and unreasonable, and without substantial relation to the public health, safety, morals, or general welfare," before it can be declared unconstitutional. The federal government's recognition of the zoning practice—with the enactment of the SZEA in 1926, and the Standard City Planning Enabling Act in 1928—was another important step towards the legal institutionalization of zoning. Thus, by the early part of the 20th Century, local governments had guaranteed their power to have full, almost unhindered, discretion over zoning and urban planning decisions (Fischel, 2000).

Planning and zoning laws are usually explained as a modern response to the genesis of industrial cities and the resulting social challenges (Fainstein & DeFilippis, 2016; Hall, 2002; Valiante, 2016). In this sense, arguably, government officials in New York City, and elsewhere were inspired by ideas such as those developed by Howard, when they aimed to promote the public's interest by providing safe, healthy, well organized, top-down, controlled spaces (Campbell & Marshall, 2002). Alternatively, the development of zoning might be explained as reflecting the politics of interest groups (Shoked, 2011). Property owners and land developers realized Olmstead's predictions in their broader sense and urged city politicians to protect and enhance the value of their assets by separating uses, and regulating the density, shape, and size of buildings in order to secure higher land values and to preserve the local tax base (Henderson, 1985; Wheaton, 1993). These two background stories may stand in conflict, as they offer different justifications and goals for land use law systems. They might, however, be conceived as complementary explanations, since either way, whether intentionally or uninten-

tionally, zoning laws are correlated with racial and wealth-based segregation (Boustan, 2016, p. 105; Pendall, 2000; Rothwell & Massey, 2009).

As said, this is not an historical project. The empirical question of how zoning came to be is not our focus here. I do wish, however, to point out that the existence of two narratives about the purposes of zoning, two different views about the driving forces behind its birth, and the *tension* between them, is in fact ongoing and remains at the core of land use law (Levine-Schnur & Ferdman, 2015). On the one hand, zoning is a way to progress towards idealized forms of living. On the other hand, zoning is an externalities-management mechanism to advance particular interests of the more powerful segments of a given society, in particular—a means to influence on land prices and subsequent property taxes (Fischel, 2005; Hamilton, 1975).

In a related paper (Levine-Schnur, in press-a) I have argued that the problem with zoning and land use law, and particulary with judicial review in this field, is not in the tension between these two approaches, which could be summarized as efficiency versus social planning. The problem is that because of the existence of this tension, and as set from its genesis by the *Euclid* Court, zoning and land use law provides a framework for decision-making but *lacks any substantial ethical commitment*. In the larger picture of planning, the multiplicity of interests involved in the planning decision-making process has led the judiciary, as well as many scholars, to shy away from a focus on the substantive content of planning to the *process* of making planning decisions (MacLeod, 2012; Valiante, 2016, p. 108). In other words: there is no narrator for land use law; it operates under "an appeal to reason and logic, through a strong claim to objectivity and certain knowledge, through a voice that claims objectivity and authority" (Wetlaufer, 1990, p. 1565). The omission of an ethical commitment in zoning is especially striking given the deeply important distributive justice considerations that are determined in the planning process, and that planning has been described as having ethical issues at heart (Campbell, 2012; Lennon & Fox-Rogers, 2016, p. 15).

Following previous attempts to address an ethical foundation for justice in planning (Beatley, 2012; Fainstein, 2010), I offered to ground land use law's ethical commitment on principles of democracy and transparency; on norms of accessibility, diversity and density, and on a requirement to preserve a fair ratio between the distribution of burdens and the allocation of benefits (Levine-Schnur, in press-a). In this short contribution, I wish to explicate more on the burdens-benefits ratio principle.

I argue that an ethical land use law system should be committed to identifying how to fairly correlate between the allocation of burdens and benefits. A planning practice may be considered as creating inequality, unfair treatment, if those targeted by harmful regulation, such as eminent domain or the location of unattractive uses, "are systematically different from those benefiting from public use projects and the benefits of public projects do not sufficiently compensate" (Chen & Yeh, 2012). The future of land use law, is in identifying new regulatory models on how to mitigate these concerns. This should rely on empirical, methodological, and theoretical work that would uncover the patterns of inequalities, and support innovative ways to over-

come it (Du, Thill, Feng, & Zhu, 2016). In the remainder of this chapter, I present two examples for the need to position the burdens-benefits ratio principle at the core of land use law ethics.

2 Benefits: Development Agreements

It is a very common practice for property owners to seek developing their land in a manner incompatible with existing land use regulations or zoning plans (Kaplinsky, Tucker, Muir, & Ziff, 2012; Knesset Research and Information Center, 2007; Serkin, Ellickson, Been, & Hills, 2013). To do so, developers are required to obtain the approval of the relevant local government organ (whether zoning board, planning board, or other) (Rose, 1983). While proposed development that accords with existing land use regulations is not (usually) subject to local governments' discretion, even though it requires permission, incompatible changes are subject to a discretionary process conducted by the relevant governmental organ. Zoning boards generally enjoy broad discretion concerning the approval or denial of such applications (sometimes referred to as spot zoning), and their decisions are usually beyond substantial judicial review (MacLeod, 2012; Ostrow, 2008). When local governments are required to exercise discretion and make a decision, the option of negotiating with the property owner arises.

Anglo-American legal systems have been hotly debating whether local governments should have the power to negotiate and arrive at agreements with owners over the conditions under which development projects may be approved. For example, is the local government allowed to condition its grant of approval for a proposed development on the developer's *acceptance* of the local government's expectation that she contribute one million dollars for the construction of a new football stadium ("Koontz, 133 S. Ct. 2586, Transcript of Oral Argument", 2013), or on the developer's *voluntary consent* to purchase a new piece of art for the local art museum? (Kmiec, 1996)[2]; The U.S. Supreme Court provided a few years ago a disapproving answer to this question in light of the constitutional protection against the taking of private property rights without just compensation,[3] while in 2011 the Israeli Supreme Court ruled out the legality of such agreements (Levine-Schnur, 2013).[4] In Ontario, Canada, bargaining and extracting concessions from property owners—referred to

[2] Such a requirement was discussed in Ehrlich v. City of Culver City, 911 P.2d 429, 450–51 (Cal. S.C. 1996). The California Supreme Court held that the City's imposition of a "fee in lieu of art" to support art in public places to be a requirement that is akin to traditional land-use regulations. In CC [HP] (TA) 1115/96 the Constructors and Builders Association in Tel Aviv Yafo v. The Tel Aviv-Yafo Municipality (4.5.1997) (Isr.), an Israeli District Court denied the local government's directive according to which the planning board will not grant approval for public or large-scale residential projects unless artistic elements valued at the equivalent of 1 per cent of the total value of construction are provided, as a requirement that the local municipality was not authorized to pose.

[3] Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

[4] CA 7368/06 Dirot Yokra, Inc. v. The Mayor of the Municipality of Yavne (27.6.2011) (Isr.).

as agreements under Section 37 of the Ontario Planning Act, 1990 (Ca.)—is a common practice which has been at the focus of academic and public debate in recent years (Makuch, 2016; Metcalf, 2015; Moore, 2013a, 2013b; Morgan, 2012). In these three jurisdictions the debate over bargaining for land development is far from resolved: to the contrary—it is at a high heat.

There are different types of agreements between local governments and private developers concerning the development pattern of private properties. One way to catalog agreements is with regard to the question of how standard the arrangements they include are, namely to what extent they are the result of real negotiations between the parties or merely reflect a pre-existing template into which only the specifics of the project were inserted. The question is whether with regard to the main elements of the agreement (and not only with regard to peripheral matters such as the details of an insurance scheme demanded by the local government), it is in fact a standard form that is based on instructions that were predetermined by the local government and are now applied to the circumstances of the particular developer. Such *standard agreements* might include, for instance, an obligation for the developer to construct on-site facilities, e.g., utilities and a certain amount of parking lots, etc., where the obligations are required as a by-product of applying the governmental authority's requirements per relevant unit, and in return the authority in charge approves the development project or waives the relative share of the demand for impact fees that would otherwise be required under local law. In this case, the agreement is predictable, does not reflect the specific characteristics of the site or the negotiation abilities of the parties, and is not a result of a concrete assessment of the current needs of the city and the effect of the proposed project on them.

Another type of agreements is one which contain a unique arrangement that reflects the results of direct negotiations between the parties, where the core arrangements vary from one agreement to another. Such agreements will be termed *non-standard agreements*. For example, a non-standard agreement might include an obligation for the developer to preserve certain buildings of architectural-historical value that are off-site of the project, while the authorities approve her development proposal that is different than the usual type of development for that area, in its height, shape, use or aesthetic design. This is a one-time, unique arrangement that results from a specific negotiation between the parties.

The American legal doctrine does not seem to distinguish between the two types of agreements, and would probably refer to both of them as exactions. Exactions are unilaterally determined in-kind or cash contributions for public goals that are required by the local government from a land-owner wishing to develop a private property as a precondition for approving the proposed development[5] (Been, 1991, pp. 478–483). The two-pronged exactions doctrine established in the last decades holds that a permit condition that requires the dedication of physical rights to land (such as right of way) must bear an "essential nexus" between the purpose of the condition and the governmental purpose for withholding the benefit,[6] as well as

[5] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

[6] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

"rough proportionality" between the harms created by the project and the condition imposed upon the owner.[7] The analytical basis for the exactions doctrine set out in *Nollan* and *Dolan* is the Unconstitutional Conditions Doctrine, according to which "the government may not deny a benefit to a person because he exercises a constitutional right".[8] *Nollan* and *Dolan* "involve a special application" of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits (*Koontz*, 133 S. Ct. at 2606; *Dolan*, 512 U.S. at 385).[9] Thus, the *Nollan* and *Dolan* tests, as was recently noted in *Koontz*, "prevent the government from exploiting the landowner's permit application to evade the constitutional obligation to pay for the property" (*Koontz*, 133 S. Ct. at 2604).

The exactions doctrine sets the substantive limitation on the obligations the government can impose on a land developer to mitigate the direct effects of his development. As applied by the U.S. Supreme Court, this doctrine could be seen as demanding a relatively high level of correlation between the development project and the contributions that can be demanded from the developer. Opposing views have been proposed with regard to the question whether the exactions doctrine applies to bargained land development as well (Callies & Tappendorf, 2000; Callies, Curtin, & Tappendorf, 2003, p. 113; Fenster, 2011, pp. 628–630; Starritt & McClanahan, 1995).

Two issues arise: first, whether the local government and the developer can agree that the developer will make highly correlated contributions to the public in a format that is a bit different than that prescribed under the local law, while the regulatory change required to the existing regulatory scheme is minor and the developer's contributions are highly correlated to the project's direct effects (Type 1 agreements). Second, whether the local government and the developer can agree that the developer will make contributions which are not highly correlated with the project's direct effects in return for meaningful discretionary changes to the regulatory scheme, such as additional land use rights (Type 2 agreements). Type 1 agreements are usually standard ones, while Type 2 agreements are not.

A few years ago, in the *Lingle* case, the Supreme Court found that in the context of the Constitutional Taking Clause (U.S. Const. Amend. V.) each regulatory action enjoys its own test for judicial scrutiny, therefore the *Nollan/Dolan* balancing test is restricted to the specific circumstances in its text (Fenster, 2006). In other words, it allegedly applies only to in-kind dedications of land and only to adjudicated requirements that are *mandatory* conditions for rezoning application approvals, and therefore bargaining arrangements are excluded from the doctrine's application with regard to either Type 1 or Type 2 agreements. However, this issue has recently been reopened following the Supreme Court's decision in the *Koontz* case.

Coy Koontz, the owner of a property designated as a riparian habitat protection zone, requested a permit from the local Water Management District, which under

[7] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[8] Regan v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983).

[9] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

the local law requires permit applicants that wish to build on wetlands to offset the resulting environmental damage. The District's attempts to negotiate with Koontz over the terms under which the application would be approved failed because he refused to discuss offsite mitigation, such as replacing distant culverts and plugging drainage canals on other properties or paying a certain amount of money for those purposes, noting that the proposal he submitted was "as good as it can get." Soon afterwards, Koontz's permit application was denied, in consistence with the District's view that the application failed to satisfy Florida law.

In its 2013 decision, the Supreme Court applied the *Nollan/Dolan* tests to this case, hence a case where the government simply denied a permit until the owner met the condition imposed in the permit process. The decision left scholars and practitioners in much confusion, specifically with regard to the legality of voluntary agreements (Clodfelter & Sullivan, 2014; Echeverria, 2014; Fennell & Peñalver, 2014; Mulvaney, 2016; Nolon, 2015). Some scholars contend that the decision has no bearing on contracts negotiations between local governments and land developers, although they warn of the chilling effect it would bring about (Saxer, 2016; Selmi, 2015; Serkin, 2016).

Based on a theory of urban agglomeration and capitalization of urban amenities I developed elsewhere, I argue that Type 2 agreements should be permitted as long as we are able to substantiate them on an ethical ground which is substitutive to the Nollan/Dolan test (Fennell, 2014, p. 134; Levine-Schnur, 2014). Such an ethical ground should be based on the burdens-benefits ratio approach. Development agreements should be evaluated under a *commensurability substantive criterion*. It should apply for the assessment of negotiations strategies, provided that the bargaining scheme adheres to the accepted public policy orientation of the community and that any contribution granted by the developer is of a "public nature." The proposed commensurability criterion is the first to refer to both sides to the bargaining. Instead of determining whether there is rough proportionality between the harm created by the project and the condition imposed upon the owner (as the *Dolan* test asks), the question of commensurability refers to:

1. the extent to which the regulation was changed to meet the developer's request, including the extent to which the regulatory process was changed; and
2. the extent to which this change enabled the developer to internalize and to benefit from urban surpluses and the positive and negative effects of the proposed development on urban values.

If there was no change in the existing regulation (where change denotes any material deviation from substance or procedures) then such agreements should not be advanced. Why should someone be required to pay for something that no one else is paying for and was not the outcome of his or her active engagement? If there is a major change to the regulatory scheme then, under certain circumstances, not paying for it might be unjust. The fact that some people derive more benefit than others from governmental activities or from regulation raises questions of distributional justice. I share these concerns. But even before we implement a total system of givings' taxing (Bell & Parchomovsky, 2001) of out-of-the-blue benefits generated

from regulatory changes, we can accept that there is moral difference between (1) land-owner "A" who, so it happens to be, benefits more than land-owner "B" from a change in regulation from a regulatory scheme "R" to a regulatory scheme "R1," in which case "A" should not be required to pay an extra share of taxes over "B"; and (2) land-owner "C," who engaged with the government to bring about "R1," a regulatory scheme which betters him more than "R," in which case it seems fair that "C" should pay an extra share for the benefits resulting from the shift between "R" and "R1." When the change enables the developer to extract urban surpluses, and they are the reason for the superiority, for him, of "R1" over "R," then the case for requiring the developer to pay for these benefits seems to be a stronger one.[10]

Let's illustrate with an example. Anne is a landowner who owns a piece of land that is zoned for residential use. Over the years since the zoning ordinance was approved, properties surrounding that land were purchased by the local government, which established a variety of cultural activities there, creating a viable urban environment. Anne now wishes to benefit from the surpluses created by the land's proximity to this thriving urban environment by constructing a luxury building that would be utilized for both residential and commercial uses. In order to make this happen, a change is required in the zoning ordinance. This change is not immaterial (it involves a change in the permitted use as well in the type and character of the residential use). The contributions negotiated with the landowner would meet the requirement for commensurability if the added value will be fairly and efficiently divided between the community and the developer. Efficient allocation in this regard is Pareto optimality (Calabresi & Melamed, 1972, pp. 1094–1095). If the developer is about to benefit from the proposed development, but not because of the urban condition but rather, for instance, because of a new green technology she intends to use for construction on the site, then there is no justification for conditioning changes to the regulatory scheme on the developer's contributions.

The first condition of the proposed criterion targets the level of discretion that the local government applies in order to reach a consensus with the developer. If the government did not bring about a meaningful change in the pre-agreement regulatory state of affairs then, in essence, it didn't "give" anything of value. If that is the case then for it to "get" anything from the developer in return is not justified. The second condition of the proposed criterion targets the utility function of the developer, inasmuch as it is affected by the capture of positive urban spillovers and the interrelations between this and the effects on the city. The idea of urban price capitalization can be summarized as follows. There is a good deal of empirical support for the connection between land prices and local amenities. Certain urban amenities or goods have a positive effect, which is captured by property owners when their real estate goes up in value. Property owners gain from positive externalities that are not by-products of their investment or actions. The urban environment, with its

[10] I refer here to a benefit principle which is different from the one suggested by Thomas Beatley (Beatley, 1988, p. 84) ("The benefit principle states that those who reap the benefits of public projects ought to bear their costs in direct proportion to the level of benefits received").

infrastructure and social and cultural life, the creation of multiple unidentified parties, contributes to the value of urban properties.

Since there are justifications for not propertizing some of the externalities created by property-owners in order to leave open the possibility of third-party productivity and inventory behavior (which would lead to greater social benefit) (Frischmann & Lemley, 2007; Parchomovsky & Siegelman, 2012), the result is that urban property owners internalize urban surpluses they did not create in a way that might be beneficial to the public's interest. Up to a certain point this internalization might have a "spillover effect": given the urban surpluses, property owners develop their land in an innovative way that further promotes the urban-amenity value. Take, for example, a café located at a central location. Ideally, the owners will earn greater profits as a result of the cafe's proximity to the desired environment, and the general public will benefit by the existence of the café as one of the elements that make the location a popular place.

If a proposed development that requires a regulatory change not only intends to benefit from urban surpluses but also, or alternatively, positively or adversely affect urban values, inasmuch as we can assess that in advance and given the broad meanings that any attempt to define urbanity yields, then those effects should be taken into consideration. Assessing the effects on abstract notions such as urban values cannot be done with predetermined formulas. We must employ concrete judgments about the desirability of such development projects, taking into account a range of possible interactions between the developer and the development and the government and the city. Thus, the internalization of urban amenities by the property owner might, at a certain point, have a negative effect on social benefits in terms of creativity, innovation, accessibility, equality, and the like. For example, if the café owners' building design includes high walls around their place in order to promise their visitors maximum privacy, they will be denying one of the elements that give an urban place its vitality: accessibility and an open feeling. When property rights are too liberal or too loosely defined, social benefit, such as that created by the features of urbanity, might be adversely affected. This is the case where there are urban costs to the internalization of external surpluses. If a development project doesn't internalize urban surpluses or—overall after calculating the positive effects—adversely affects urbanity, then the commensurability demand is not fulfilled and therefore conditioning a regulatory change on a developer's contribution may be considered a threat.

It is argued that certain costs are not realized in the current understanding of the mechanism of property rights; the value of the urban environment has no standing in decisions regarding the use of urban lands. I therefore suggest that a property owner's internalization of the fruits of others' activities ought to be limited to the level at which this internalization advances the development of urban amenities. Ignoring social harms caused by over-internalization (internalizing urban benefits in a way that creates an urban harm) might lead to a social waste. The concrete optimal level of internalization should be determined on a case-by-case basis.

Bargaining should therefore take into consideration the extent to which the developer's request for spot zoning, if approved, would benefit from urban amenities, and, if so, require him or her to share the added value with the community. It is

necessary to develop a procedural mechanism to assist in deciding what level of urban surpluses the new development would enjoy, e.g., an "urban impact assessment," along the lines of environmental and social impact assessments (Gramling & Freudenburg, 1992; Karkkainen, 2002; Revesz & Livermore, 2008). The need to individually analyze the relationships between the regulatory change and the level of enjoyment of urban surpluses justifies the use of development agreements as the relevant means—contrary to an impact levy or betterment taxes. Fixed formulas cannot replace the need to employ human evaluation, discussed in a democratic way, about the wisdom of the development proposal, its interactions with its surrounding environment, and the extent and weight of the regulatory changes required.

Each of the conditions for the commensurability criterion could be classified at one of the following three levels of intensity—low, mid, and high. For example, if the regulation was intensively changed to meet the developer's request, then it would be described as a "high" level of regulatory change; if the desired change enables the developer to internalize a very minimal level of urban surpluses, then it would be categorized as "low." Each instance of regulatory bargaining should be analyzed in light of the combination between the levels of both conditions. The higher the aggregate the broader the discretion of the local government to extract more public contributions that are not directly related to the proposed development.

This can be visualized in the following manner (Table 1):

It is necessary to match these levels of discretion with the appropriate types of legitimate contributions that can be asked from a developer in the negotiation stage. For example, one of the relevant factors is the public nature of the contribution. A developer's contribution that serves the needs of the proposed development would reflect a low (the lowest) level of discretion. A developer's contribution that serves the needs of the nearby neighbors should be regarded as reflecting a mid-low level of discretion. Contributions can be listed in accordance with the following factors:

- Who would enjoy the contribution: for example, only the proposed development's users; the immediate neighbors; residents from all over the city; all urban users, including commuters and tourists;

Table 1 Typology of levels of local government's discretion in pursuing development agreements

Level of surpluses capitalized	Level of regulatory change		
	Low	Mid	High
Low	Low level of discretion	Mid-low level of discretion	Mid level of discretion
Mid	Mid-low level of discretion	Mid level of discretion	Mid-high level of discretion
High	Mid level of discretion	Mid-high level of discretion	High level of discretion

- Whether payment would be required: for instance, if a developer is required to build a public parking area which he would manage and determine and collect fees for the use thereof, then that fact must be explicit and calculated when deciding whether to approve the project;[11]
- Whether there is a correlation between the essence of the proposed development and the contribution: for example, if the development serves the elderly, whether or not the contribution is useful for the needs of the elderly; if the proposed development is a commercial construction, whether or not the contribution is related to a commercial cause, etc.;
- Whether the contribution is on-site or off-site;
- How much control the developer would have on the actual formation of the contribution: whether the developer is involved in constructing the public utility, in maintaining it over time, or in controlling who will use it. Consider a park as a contribution, for instance. If the developer develops the park and then places it under the sole control and maintenance of the city, that is one thing. But if the park remains subject to ongoing maintenance by the developer then his or her control of areas that serve the public may be considered as the privatization of the public sphere, which stands in opposition to urban values;
- Whether the contribution is granted for specific and identified goals or it is for the local government to decide what do with it in the future (that would usually be the case with monetary contributions);
- How important is the contribution to the city? How much does it save the city?

My contention is that it is required of local governments, assisted by the public (including members of interest groups, developers, residents, etc.), to shape the local set of criteria that reflects a concrete match to the level of discretion and types of contributions.

3 Burdens: Expropriation of Land for Public Uses

The next example to illustrate the type of analysis the burdens-benefits ratio principle requires is focused on the expropriation of land for public uses. The government's power to take private property for public uses can be found in all legal systems (Versteeg, 2015). It enables governments to overcome strategic bargaining problems such as holdout and land assembly and acquire land needed to facilitate public goods (Kelly, 2011). It is considered an essential tool to enhance social welfare, promote progress, and provide non-rival public goods. However, the existence of such powers gives rise to concerns about their potential abuse by government officials. For this reason, many constitutions impose the following constraints on governments when they seek to take private property (Lindsay, Deininger, &

[11] See, AdminC (TA) 2111-09 Rosenblum (Goren) v. Tel-Aviv Yafo Municipality (19.2.2012) (Isr.); AdminC (TA) 31405-09-13 Mindleen v. Tel-Aviv Yafo Municipality (10.4.2014) (Isr.).

Hilhorst, 2016). First, that private property shall not be taken without just compensation (fair market value) to the aggrieved property owner; second, that taking is justified only when it is for public use or public purposes.

In legal jurisprudence, takings for traditional, purely public, purposes such as roads, parks, and public buildings, are usually regarded the core example of proper and fair use of the expropriation power, and, mostly, subject to minimal judicial review (Bell & Parchomovsky, 2006; Epstein, 1985). This is so despite evidence that poor and minority neighborhoods were the frequent targets during the construction of interstate highways in the U.S. (Frieden & Sagalyn, 1991, p. 28). So is with takings for economic development. Poor people, politically weak, African-Americans and other minorities were usually required to bear the burden but not the benefit of economic development. In fact, in some cases, this is the outcome of an intentional effort to clear away "slums" or "underdeveloped" properties held by members of these communities (Becher, 2014; Carpenter & Ross, 2009; Frieden & Sagalyn, 1991; Gans, 1982; Gotham, 2001; Pritchett, 2003; Somin, 2015).

The vast evidence in support for the distributive concern with takings for economic development brought a U.S. Supreme Court Dissent to question the justification for such takings, despite long-lasting doctrine that permits it.[12] Thus, in *Kelo* Justice O'Connor, stated in her Dissent to the Court's approval of the plan to take the petitioner's house for establishing a Pfizer company facility, that the fallout from the Court's decision "will not be random." Thus, "the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process… As for the victims, the government now has license to transfer property from those with fewer resources to those with more".[13] The strong public backlash to the 5-4 *Kelo* decision was fueled by the dissent's focus on *who wins and who loses* from such takings (Hoehn & Adanu, 2014; Nadler & Diamond, 2008).

In an important contribution, Daniel Chen and Susan Yeh (2012) examined whether takings increase inequality, which will be found "if those targeted by eminent domain are systematically different from those benefiting from public use projects and the benefits of public projects do not sufficiently compensate." They report that court decisions that expanded the government's power of expropriation spur economic growth and property prices by 0.2% points, but reduce *minority* home ownership and employment by 0.5% and 0.3% points, respectively. Their study does not distinguish, however, between pro-takings decisions regarding takings for pure public purposes and decisions regarding economic development, but seem to mostly document the effects of cases of the latter kind. Furthermore, Chen and Yeh's methodology is limited in the sense that they did not study the direct distribution of the taking *burden* in their case studies nor the different levels of enjoyment from the public goods facilitated by the takings.

Prior literature identified a distributive problem with designating land (and expropriating it) for public but noxious uses. In NIMBY or LULU (locally unwanted/undesired land uses) cases, it has been argued that those with the power impose on

[12] Berman v. Parker, 348 U.S. 26.

[13] Kelo v. City of New London, 545 U.S. 469.

those who lack it noxious land uses, such as homeless shelters, drug/alcohol treatment centers, waste disposal facilities, etc. (Been, 1992).

However, takings may have distributive effects even when they are for public but *non-noxious* uses. Such might be the case where a private property is taken for a highway which does not serve the local neighborhood directly but nevertheless has an adverse effect on it as it limits future development, minimizes open spaces, etc. In such a case, beyond the individual harm, the effected community bears the burden to supply the needs of the general public without any compensation to its *community loss*. We can term such cases *Community Devaluing Land Uses* [CDLU]. In cases where the effected community can be identified by the political, ethno-religious, or socio-economic status of the vast majority of its residents, then a distributive aspect might come into play, if the burden of supplying CDLU is not distributed fairly among different communities. Another example for a distributive concern with takings is when land taken from one community is used for wealth increasing public goods such as parks, schools, and daycares, while at another community—which is clearly different in its residents' political, ethno-religious, or socio-economic status—the land taken is used for CDLUs such as citywide roads. In other words, for takings for pure public uses to be distributed fairly, individual compensation might not suffice. There is a need to establish that what may seem to be a benefit to the public is not in fact a benefit to some communities but burden to others, who are part of politically or otherwise weak segments of the society.

To study the burdens-benefits ratio in the context of pure public use takings, I take advantage of a unique institutional situation in Jerusalem, Israel (Levine-Schnur, in press-b). Palestinians residing in Jerusalem are a large ethno-religious group, which represents 37% of the city's population. Their political power at the local level is especially low. They are 31% of the eligible voters for the local government, but their voter turnout is less than 1%. The reason for that is political: their vote may seem to grant approval to the Israeli annexation of East Jerusalem in 1967 which they (and the international community) perceive as illegal. They are left therefore totally unrepresented at the local level, in particular in the land use planning commission were expropriation powers are held. Geographically, the city exhibits a very high degree of segregation: Jews and Palestinians live in separated neighborhoods. The segregation is the result of historical developments. Individual preferences and related reasons. Integration is not prohibited. Thirty-six per cent of the city's land is in Palestinian areas, and the rest is in Jewish ones. Most public goods such as local roads, schools, playgrounds, and open public spaces, are available at the neighborhood-level. Other public goods, especially citywide roads, serve both communities indistinguishably. Jewish and Palestinian neighborhoods exhibit many differences—in terms, for instance, of land values, security of title, and property tax values. Jerusalem therefore provides an exceptional example to test the distribution of takings' burdens and benefits across political and ethno-religious lines.

I collected and coded data from the city's archives and from other public records on all exercises of eminent domain for local public uses by the City of Jerusalem between 1990 and 2014 (data was completed for 97% of the general sample). In

these years, the city executed its takings powers over 369 development projects, which include 3448 discrete takings observations. I used land records to verify owners' identity, analyzed comprehensive plans and zoning maps to identify projects' beneficiaries, conducted GIS analysis of the land cover, land titling, and demographic patterns, and relied on supplementary statistical and geographical resources.

Takings in Jerusalem are split between two modes: takings from private owners—Palestinians, Jews, and Churches, i.e., private property of different Christian institutions—and takings from the state or other governmental authorities that is then redistributed back to different public purposes. In general, the ownership composition in the taking sample follows the ownership distribution in the city at large. However, expropriated land is designated for Palestinian neighborhoods purposes (and not to citywide or Jewish neighborhood purposes) in a rate which falls both under this population's size (relative to the Jewish one) and—to a much greater extent—under its relative share of contribution to the overall pool of expropriated land.

Palestinians contributed 38% of the land taken over the years, while their neighborhoods benefited at the local-neighborhood level from only 10% of it. For Jewish owners the opposite ratio exists: 4% and 33%, respectively. The majority of the land expropriated from Palestinians was used for citywide purposes, and the rest for Palestinian neighborhood ones. Land taken from Jews and Churches, however, is used almost only for Jewish neighborhoods' purposes. State land is used almost only for Jewish and citywide purposes. Thus despite the fact that over the course of 25 years, Palestinians contributed 36% of the land used for citywide goods, they benefited at the neighborhood level from only 2% of the land taken from the state to be redistributed in the planning process. For Jews, again, the opposite ratio exists: 3% and 48%, respectively. Furthermore, most of the land designated for public buildings (schools, kindergartens, daycares, etc.) and public spaces (parks) went to Jewish neighborhoods, whilst the land taken for Palestinian neighborhoods was used mostly for roads. In fact, the city took land from Palestinian owners for citywide services but failed to supply Palestinian neighborhoods enough and as good open public spaces and public buildings.

Compared to Jewish land, where the property rights are not formalized (titled)[14] but mostly claimed by Palestinians, the land is subject to higher propensity of being taken for citywide use and not local neighborhood purposes, an effect which is substantially higher when the sole public use is roads. For titled Palestinian land compared to Jewish land, the differences are lower, and the effect of the specific public-use—road not road—is not large. In other words, *non-formalized land claimed by the politically-weak minority is more susceptible to be taken for citywide roads than any other alternative*.

These findings appear to call into question the reliance on the public use and just compensation requirements to assure fairness, even in cases of pure public-use takings. They emphasize the effect that political and ethno-religious differences may

[14] "Formalized" or "titled" land refers to land that is listed in an official land record, and hence its owners are publicly known (cf, Merrill & Smith, 2016, pp. 857–881).

have on taking decisions; and point at the need to find solutions to overcome the potential for an unequal distribution of burdens and benefits across different communities, where major differences between different segments of society exist.

4 Conclusion

Revitalizing land use law is an impractical task. I aimed to present in this chapter what I think should have been a leading principle in this process of founding an ethical basis for land use law: the burdens-benefits ratio principle. Despite the many difficulties in the way of reforming the field, I hope that practitioners, urban planners, scholars, public officials, judges and others, would attain to the call for better distributive outcomes in the planning process this chapter is asking for. In practical terms that would mean, to regenerate the use of development agreements, to push and trigger existing doctrines, in order to allow this to become a tool for a fairer distribution of urban surpluses. In addition, the use of eminent domain powers should be sensitive to identifying those who pay and those who enjoy from this practice, across susceptible lines such as political power, ethnicity or religious, regardless of the limited option to litigate takings once they have already been dropped out of the box.

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